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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEO BURROUGHS, JR., et al.,

Petitioners,

v.

CARLA HILLS, Secretary, Department of Housing and Urban Development, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether neighbors of residential property owned by the Department of Housing and Urban Development ("HUD") have a private right of action to seek damages from HUD and its agents under the National Housing Act, arising from the rapid deterioration of the property during HUD ownership and the resulting deleterious impact of that deterioration upon those neighbors and their families.

2. Whether the district court properly exercised its discretion to deny costs to a prevailing party under Rule 54(d) of the Federal Rules of Civil Procedure, on the grounds that the lawsuit was brought by plaintiffs of limited means to resolve novel questions of "considerable public interest and importance" rather than to obtain private gain.

RULE 21 STATEMENT

The proceedings below were brought by Leo Burroughs, Jr., Esther Robinson, Donald Schatz, Earl Whatley, Steven Goldsmith, Anton Seals, Ishmael Seye, Lizzie Mae Bonner and the Five Block Club. These parties are petitioners in this Court. Appellees below included Carla Hills, as Secretary of the United States Department of Housing and Urban Development; John Waner, Martin Rogan, William Miller, John Davis, and Stanley Nykiel, individually and in their official capacities as agents of the United States Department of Housing and Urban Development; and Seward Rist. These parties are respondents in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

RULE 21 STATEMENT..... ii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 2

JURISDICTION..... 2

STATUTES INVOLVED..... 3

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT..... 9

I. THE COURT OF APPEALS' DECISION ERRONEOUSLY DEPRIVES PETITIONERS OF THE MEANS OF GIVING SUBSTANCE TO THE NATIONAL HOUSING POLICY..... 9

II. THE COURT OF APPEALS' DECISION ON COSTS IS CONTRARY TO THE ORIGIN AND PURPOSE OF RULE 54(d)..... 29

CONCLUSION..... 48

TABLE OF AUTHORITIES

Cases

Berner v. British Commonwealth Pacific Airlines, Ltd., 362 F.2d 799 (2d Cir.), cert. denied, 385 U.S. 948 (1966)..... 34

Black Hills Alliance v. Regional Forester, 526 F. Supp. 257 (D.S.D. 1981).... 36

Boas Box Co. v. Proper Folding Box Corp., 55 F.R.D. 79 (E.D.N.Y. 1971)..... 45, 47

Cannon v. University of Chicago, 441 U.S. 677 (1979)..... 17

Cort v. Ash, 422 U.S. 66 (1975).... 16

County & Suffolk v. Secretary of the Interior, 76 F.R.D. 469 (E.D.N.Y. 1977), cert. denied, 434 U.S. 1064 (1978)..... 34

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)..... 33

Estrada v. Hills, 401 F. Supp. 429 (N.D. Ill. 1979)..... 26, 41

Fishgold v. Sullivan Drydock & Repair Corp., 338 U.S. 275 (1946)..... 32

Hodgman v. Atlantic Refining Co., 20 F.2d 949 (D. Del. 1927).... 31

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 1825 (1982)..... 16

Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1 (1981)..... 23

National Organization for Women v. Bank of California, 680 F.2d 1291 (9th Cir. 1982)..... 33

Newton v. Consolidated Gas Co., 265 U.S. 78 (1924)..... 31

Popeil Bros., Inc. v. Schick Electric, Inc., 516 F.2d 772 (7th Cir. 1975)..... 31, 40

Rural Housing Alliance v. U.S. Dept. of Agriculture, 511 F.2d 1347 (D.C. Cir. 1974).... 33

Schaulis v. CTB/McGraw Hill, Inc., 496 F. Supp. 666 (N.D. Ind. 1980)..... 36

Shima v. Brown, 140 F.2d 337 (D.C. Cir. 1943)..... 38

Texas & Pacific Railway Co. v. Rigsby, 241 U.S. 33..... 22

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979)..... 17

United States v. Mitchell, 103 S. St. 2961 (1983)..... 24, 25, 26

Statutes

Housing Act of 1937
42 U.S.C. § 1401..... 11

Housing Act of 1949
42 U.S.C. § 1441..... 12, 19

Housing and Urban Development Act Amendments
42 U.S.C. § 1441a..... 13, 19

National Housing Act
12 U.S.C. § 1710..... 14, 15

Other Authorities

Federal Rules of Civil Procedure
Rule 54(d)..... 30

House Rpt. No. 1564, 80th Congr. 2d Sess.
(March 15, 1978)..... 19

HUD Property Disposition Handbook: One to Four Family Properties..... 14

Senate Rpt. No. 84, 81st Congr., 1st Sess. (February 25, 1949)..... 20

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Leo Burroughs, Jr., Esther Robinson, Donald Schatz, Earl Whatley, Steven Goldsmith, Anton Seals, Ishmael Seye, Lizzie Mae Bonner and the Five Block Club respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 741 F.2d 1525 (7th Cir. 1984) and is set forth in Appendix A. The Seventh Circuit's denial of rehearing en banc is not reported and is set forth in Appendix B. The district court's final order on summary judgment is reported at 564 F.Supp. 1007 (N.D. Ill. 1983) and is set forth in Appendix C. The district court's minute order on the issue of costs is not reported and is set forth in Appendix D. The district court's ruling on the motion to dismiss is not reported and is set forth as Appendix E.

JURISDICTION

On August 15, 1984, the United States Court of Appeals for the Seventh Circuit entered judgment against

appellants-cross-appellees. On October 22, 1984, the Seventh Circuit denied cross-appellees' petition for rehearing and suggestion for rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTES INVOLVED

The relevant provisions of the National Housing Act and related statutes and regulations are set forth in Exhibit F.

STATEMENT OF THE CASE

In November, 1974, pursuant to Section 204 of the National Housing Act, 12 U.S.C. § 1710, the United States Department of Housing and Urban Development ("HUD") acquired title to a three story residence in the South Shore community of Chicago, after entry of a decree of foreclosure. HUD held title

to the property for a period of approximately twenty months.

The parties have stipulated that during HUD's stewardship, the property became infested with rodents, and the building on the property fell into serious disrepair.*/ The building also became a frequent target of vandals. For the 20-month period during which HUD held legal title, the net market value of the property fell from approximately $23,000 to $0.

Petitioners brought the deteriorating condition of the property to the attention of several of the defendants in a face to face meeting in which the petitioners presented a community petition declaring the property "a

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*/ This case was presented to the district court pursuant to a stipulation of facts agreed to by all parties.

clear and present danger." Petitioner's efforts, however, proved fruitless; other than paying its monthly fee to the Area Management Broker, HUD expended a total of only $285.00 to maintain the property in the entire 20 month period during which it held title.

In view of HUD's neglect of this property and HUD's documented neglect of thousands of other like properties in Chicago and throughout the nation, plaintiffs filed this action in April, 1976, under the National Housing Act and principles of pendent jurisdiction. 28 U.S.C. § 1331. The individual plaintiffs, residents of apartments located within 500 feet of the HUD owned property, together with the Five Block Club, a voluntary community organization, named as defendants the HUD officials

(the "federal defendants") responsible for the building and the Area Management Broker (Seward Rist) hired by HUD to maintain the property. Plaintiffs sought relief arising from defendants' neglect of the property in violation of the National Housing Act, state law, and a Chicago ordinance.*/

In October, 1978, District Court Judge Leighton denied the defendants' motion to dismiss plaintiffs' claims, finding that the complaint stated a cause of action for violation of the National Housing Act. See Appendix E. After further discovery, the parties

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*/ While suit was pending, the property was sold by HUD to the City of Chicago for $1.00 under the Property Release Option Program. The City subsequently reconveyed the property to the South Shore Senior Citizens Center. HUD's sale of the property rendered moot plaintiffs' prayer for injunctive relief.

stipulated to the relevant facts concerning the condition of the building and the nature of plaintiffs' injuries. Specifically, as the parties stipulated, the deteriorated condition of the building during HUD's ownership interfered with petitioners' leasehold interest in the surrounding property and caused petitioners to fear for the health, safety and welfare of the neighborhood.

Each party then filed cross-motions for summary judgment. In March, 1983, District Court Judge Moran granted summary judgment in favor of the defendants, finding that, although plaintiffs had a private right of action for injunctive relief under the National Housing Act and state law, plaintiffs could not maintain an action for damages. See Appendix C. The Seventh Circuit affirmed

Judge Moran, in a per curiam opinion with three separate concurring opinions. The Seventh Circuit ruled that petitioners had no private right of action under the National Housing Act or state or local law. See Appendix A.

After Judge Moran ruled on the cross-motions for summary judgment, the federal defendants submitted a Bill of Costs amounting to $1,133.65 (corrected). Plaintiffs objected to the Bill on a timely basis, on the grounds that this case was brought in good faith by individuals of limited means to vindicate the public interest in realizing the national housing goals established by Congress as well as the statutory mandates created by the State of Illinois and the City of Chicago. After full briefing on the issue, District Judge

Moran denied costs to the federal defendants, exercising his equitable discretion under Rule 54(d), Fed.R.Civ.P. See Appendix D. In three separate concurring opinions, the Seventh Circuit reversed the order below, held that Judge Moran abused his discretion under Rule 54(d), and awarded costs to the defendants. See Appendix A. The Court of Appeals subsequently denied petitioners' petition for rehearing on the issue of costs. See Appendix B.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DECISION ERRONEOUSLY DEPRIVES PETITIONERS OF THE MEANS OF GIVING SUBSTANCE TO THE NATIONAL HOUSING POLICY.

This petition raises substantial issues concerning the maintenance and

control of properties acquired by HUD through foreclosure under the National Housing Act. During the period involved in this lawsuit, the General Accounting Office estimated that HUD owned approximately 45,000 such properties nationwide. The GAO also reported that the deterioration of these HUD-owned properties in the mid-1970's created health and safety hazards and contributed to the physical deterioration of neighborhoods around the country. This lawsuit represents one community's response to HUD's neglect of its statutory duties by those victimized by the rapid deterioration of a single family residence entrusted to HUD's care on the south side of Chicago.

In 1937, Congress declared that it was the policy of the United States "to remedy the unsafe and unsanitary housing conditions and the acute

shortage of decent, safe, and sanitary dwellings for families of low income, in rural and urban communities, that are injurious to the health, safety and morals of the citizens of the Nation." Housing Act of 1937, 42 U.S.C. § 1401 (1940). Twelve years later, in its formal declaration of the national housing policy, Congress set the following objectives of government housing policy:

> housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and suitable living environment for

> every American family . . . .

Housing Act of 1949, 42 U.S.C. § 1441. To insure this result, Congress declared further that

> [t]he Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective thereby established . . . .

Id.

Almost twenty years later, in recognition of the fact that the nation had "not directed sufficient attention and resources to the preservation of

existing housing and neighborhoods," 42 U.S.C. § 1441a (b), Congress declared:

> a greater effort must be made to encourage the preservation of existing housing and neighborhoods through such measures as housing preservation, moderate rehabilitation, and improvements in housing management and maintenance, in conjunction with the provision of adequate municipal services. Such an effort should concentrate, to a greater extent than it has in the past, on housing and neighborhoods where deterioration is evident but has not yet become acute.

Housing and Urban Development Act Amendments, 42 U.S.C. § 1441a (c).

To implement these Congressional objectives, HUD issued a Property Disposition Handbook requiring that "immediate attention shall be given to those repairs required to prevent undue deterioration

and eliminate hazardous conditions that may be dangerous to the public." HUD Handbook, Chapter 2, Paragraph 23. The Handbook further provides that "[e]very possible precaution shall be taken to eliminate conditions which may contribute to injury or damage to the person or property of others." HUD Handbook, Chapter 3, Paragraph 70.

Notwithstanding the clarity and purpose of Congress' expressed intent and HUD's supposed understanding of that intent as reflected in its Handbook, HUD in fact chose simply to ignore many of the properties it acquired through foreclosure under Section 204 of the National Housing Act. 12 U.S.C. § 1710. Although empowered to "deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in

its discretion" the property which is the subject of this action in a manner consistent with the national housing policy, 12 U.S.C. § 1710(g), HUD instead became the slum landlord of this property and thousands others like it throughout the nation. Nationwide, the General Accounting Office estimated that in the twelve month period ending April 30, 1976, HUD's neglect contributed to an average loss of over $9,300 on each HUD-owned property, a total one year loss of over $610 million.

The Court of Appeals' decision effectively denies petitioners and others in their position, the victims of HUD's neglect, their only meaningful legal means to require HUD officials to live up to their statutory duties with respect to these properties. The Court

of Appeals refused to imply a private right of action for damages against HUD officials on behalf of the petitioners, citing Cort v. Ash, 422 U.S. 66 (1975), and its progeny. The Court's opinion, however, turns Cort on its head. Although the analysis suggested by Cort and its progeny was formulated as a means of identifying Congressional intent, Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 377-78 (1982), the Court of Appeals' decision purports to rely upon Cort to justify a result totally contrary to the national housing policy and the expressed intention of Congress.

There is no dispute that the language of the pertinent housing statutes and the legislative history of their enactment is silent on the private

right of action issue. As this Court has recognized time and again, however, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979); Cannon v. University of Chicago, 441 U.S. 677, 694 (1979). The Court of Appeals' decision in this case reflects no consideration of the language or structure of the relevant statutes or the circumstances of their enactment.

Writing for the Court of Appeals, Judge Nichols noted that he

could find no evidence to suggest that neighbors of deteriorating and abandoned HUD-owned properties were intended by Congress to be special beneficiaries of the Housing Act. Rather, Judge Nichols asserted that the primary beneficiary is the government itself, because the "object of administration between foreclosure and disposal is clearly to limit or avert the government's fiscal loss, and replenish the insurance fund . . . ." A-10. While it is surely true that Congress intended by these provisions to maintain the integrity of the mortgage insurance funds, it is also true that the declared national housing policy is to ensure "a decent home and suitable living environment for every American family" by "preservation of existing housing and neighborhoods" and by focusing

national housing efforts "on housing and neighborhoods where deterioration is evident but has not yet become acute." 42 U.S.C. §§ 1441, 1441a(b)-(c). Judge Nichols' conclusion also overlooks the findings of the congressional study which first inspired the declaration of the national housing policy in 1949. The final majority report of the Joint Committee on Housing explained in 1948 that

> any comprehensive attack on our housing problems must necessarily deal with the problem of slum and blighted areas which are threatening the health and welfare of our people. Approximately a fifth of our urban population lives in slum areas which are the breeding ground of disease and ill health, crime and juvenile delinquency.

House Rpt. No. 1564, 80th Congr. 2d Sess. (March 15, 1948). See also Senate

Rpt. No. 84, 81st Congr. 1st Sess. (February 25, 1949).

In his concurring opinion, Judge Posner suggests that "[w]hen the statute speaks of 'a suitable living environment,' 'the preservation of existing housing and neighborhoods,' and 'neighborhood disintegration' and 'deterioration,' it is referring not to the neighbors of the subsidized homeowners but to the subsidized homeowners themselves." A-27. Judge Posner would define "neighborhood" simply as "the area where the inhabitants of subsidized housing live." Id. Ironically, however, Judge Posner's reading of the statute misses the crucial fact that there are no subsidized homeowners of properties on which HUD has foreclosed the mortgage; the abandonment of these

properties is actually part of the problem. Moreover, the "area" around these abandoned HUD-owned properties is more than simply a collection of buildings or a theoretical legal concept. The "area" to which Judge Posner refers is inhabited by real people whose daily well-being is threatened by the same health and safety dangers which prompted Congress to enact and subsequently reaffirm the national housing policy.

Each of the three separate opinions in the Court of Appeals reflects the presumption that a court should imply no private right of action when the statute and the legislative history are silent on the issue. If the proper inquiry is truly one of identifying Congressional intent, however, this approach overlooks that Congress' silence

on the private right of action issue may simply reflect the accepted legal principles recognized during the period the statute was considered and enacted. However appropriate the Court of Appeals' presumption might be with respect to statutes passed after Cort was decided, the presumption is likely just the opposite of Congress' actual intent with respect to statutes such as the National Housing Act which were considered and enacted before Cort. This Court and others repeatedly held prior to Cort that a statute enacted for the benefit of a particular class presumptively afforded a remedy for members of that class injured by violations of the statute. Texas & Pacific Railway v. Rigsby, 241 U.S. 33, 37-40 (1916). See generally Middlesex County Sewerage

Authority v. National Sea Clammers Assoc., 453 U.S. 1, 22-26 (1981) (Stevens, J. concurring). This long line of authority was the law when Congress considered and declared the national housing policy in 1949. To presume that Congress in 1949 intended a result contrary to this authority is to engage in a fiction not faithful to the legislative history.

While the recent presumption against the implication of private rights of action may accurately reflect Congress' intent in the context of certain regulatory and securities statutes, this presumption runs directly counter to Congress' intent in the context of statutes which entrust in the federal government the duty to manage and control property or resources for the benefit of an identifiable class of

persons. In United States v. Mitchell, 103 S.Ct. 2961 (1983), for example, this Court held that private allottees of land in Indian reservations could sue the United States for money damages suffered as the result of the Secretary of Interior's mismanagement of Indian lands even though the various statutes under which the allottees sued and the legislative history of those statutes were silent as to the allottees' private right of action. In Mitchell this Court found that legislative pronouncements that the Secretary of Interior must consider "the needs and best interest of the Indian owner and his heirs," and internal regulatory mandates of the Secretary of the Interior to "manag[e] the Indian forests so as to obtain the greatest revenue for the Indians consis-

tent with a proper protection and enforcement of the forests" were sufficient evidence of Congress' intent to create in the Secretary of Interior an affirmative duty enforceable by the allottees of Indian lands by means of a private right of action for money damages in the event of mismanagement. 103 S.Ct. 2961, 2972. While the history of housing legislation is not nearly as lengthy as the history of American Indian legislation, the national housing policy is no less important to those communities which depend upon HUD's faithful performance of its statutory duty to manage and control the properties it acquires through foreclosure.

In addition to affording neighbors of deteriorating HUD-owned properties the right to recover for

actual injuries suffered as the result of HUD's neglect, the implication of a private right of action in this context will deter HUD's nonfeasance in the future and thereby give substance to the national housing policy for the thousands of properties acquired by HUD. Estrada v. Hills, 401 F.Supp. 429, 439 (N.D. Ill. 1975). Cf. Mitchell, 103 S.Ct. 2961, 2973. Although deterrence is a principal goal of this lawsuit, the three separate opinions in the court below do not address the deterrence effect of this action directly.*/

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*/ Judge Flaum's opinion suggests that the problems underlying the HUD property disposition program may be complex and that the deterrence effect of awarding money damages may be "speculative." A-31. The likelihood that money damages would deter such conduct in the future is substantially greater, however, than the unstated assumptions underlying the observation of Judge Flaum.

Writing for the Court, Judge Nichols posited instead that money damages "would tend to make HUD management reluctant to foreclose." A-12. This result, however, even if true, would cause no more damage to the rights of neighbors and no greater drain on the mortgage insurance fund than the result of HUD's existing policy of neglect. Moreover, if HUD failed to foreclose on such properties, many of the dwellings would be inhabited and one of the major causes of the problem illustrated by this case eliminated.

Judges Posner and Flaum suggest that the award of damages in this case would divert funds from other valuable housing programs. A-27, A-31. The funds theoretically diverted, however, are funds which should have been spent

on the maintenance of the property in the first instance. The Court's reasoning presumes that other housing programs are more important to the realization of the national housing policy than the property maintenance and disposition program to which petitioners seek to give substance in this case. Neither the statute nor any of the circumstances of its enactment support this presumption. Moreover, the Court's reasoning overlooks that, had the defendants fulfilled their statutory obligations, HUD would have expended far more for proper maintenance than the amount of damages stipulated to by the parties in this case.

The end result of the Court of Appeals' decision is to deprive petitioners of the only means of enforcing the national housing policy in the

context of the HUD property maintenance and disposition program. This result is the single least likely to reflect Congress' actual intent. This Court should grant certiorari to give effect to that intent and to make clear that the doctrine of implied private rights of action should not be relied upon as a means of sapping federal statutes of their substance and meaning.

II.

THE COURT OF APPEALS' DECISION ON COSTS IS CONTRARY TO THE ORIGIN AND PURPOSE OF RULE 54(d)

This petition also raises substantial issues concerning the scope of the district court's discretion to deny costs under Rule 54(d) of the Federal Rules of Civil Procedure.

District courts in the past have applied widely diverging and often conflicting criteria in determining whether to tax costs and in what amount. The courts of appeals have offered only limited guidance on the question. The three appellate opinions in this case are fragmented and inconsistent. Only review by this Court can resolve these inconsistencies and afford future litigants the opportunity to assess the risks inherent in the effort to vindicate statutory rights in the federal courts.

Rule 54(d) of the Federal Rules of Civil Procedure provides:

> Except when express provision is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party

> unless the court otherwise directs. . . .

In Popeil Brothers, Inc. v. Schick Electric, Inc., 516 F.2d 772, 774-75 (7th Cir. 1975), the Seventh Circuit acknowledged that Rule 54(d) embodies the historical principle that costs should be awarded to the prevailing party unless equity and good conscience warrant a different result. See Newton v. Consolidated Gas Co., 265 U.S. 78, 83 (1924); Hodgman v. Atlantic Refining Co., 20 F.2d 949, 951 (D. Del. 1927). In the present case, the district court exercised this equitable discretion and denied costs to the prevailing party on the basis that plaintiffs' case "present[ed] novel questions of considerable public interest and importance, was brought by plaintiff[s] of limited means

to seek answers to those questions rather than for commercial advantage or private gain, and was litigated in that context." Appendix D. Finding these factors insufficient, the Seventh Circuit declared that the district court abused its discretion in denying costs to the federal defendants.

The Court of Appeals' narrow construction of the permissible scope of equitable discretion afforded the district court is contrary to the origin and purpose of Rule 54(d). As a principle of equity, the presumption in favor of awarding costs to the prevailing party is not a rigid or mechanical rule. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946). Rather, the presumption applies unless there is "an element of injustice in a

cost award." Delta Air Lines, Inc. v. August, 450 U.S. 346, 355, n.14 (1981).

In the present case, the district court found an element of injustice in requiring plaintiffs of limited means to pay the costs of the federal government in litigation brought to advance important public rather than private interests. The district court's consideration of each of these factors is consistent with the practice of other federal courts of appeals. See, e.g., National Organization For Women v. Bank of California, 680 F.2d 1291, 1294 (9th Cir. 1982) (affirming district court's decision not to award certain costs because of losing plaintiffs' "limited budgets"); Rural Housing Alliance v. U.S. Department of Agriculture, 511 F.2d

1347, 1350 (D.C. Cir. 1974) (noting that court's discretion under Fed. R. App. P. 39(a) should be exercised in a way which does not discourage public interest plaintiffs from raising their claims in court); Berner v. British Commonwealth Pacific Airlines, Ltd., 362 F.2d 799, 801 (2d Cir.), cert. denied, 385 U.S. 948 (1966) (within district court's discretion to determine whether costs should be taxed against widow and children on whose behalf action was brought in good faith).

The proper scope of equitable discretion under Rule 54(d) was well analyzed in County of Suffolk v. Secretary of the Interior, 76 F.R.D. 469 (E.D.N.Y. 1977), cert. denied, 434 U.S. 1064 (1978). In County of Suffolk, various public service organizations with "limited

resources" brought suit to challenge a proposed lease sale of certain offshore sites in the federally-owned outercontinental shelf. Although plaintiffs' complaint ultimately was dismissed, the district court refused to tax costs in favor of the defendants after considering the full range of factors which define the proper scope of the district court's equitable discretion under Rule 54(d). The factors include:

> (1) was the action brought and carried forward in good faith; (2) did its prosecution provide direct or indirect benefits to the public; (3) did it result in direct or indirect benefits to defendants; (4) were novel and substantial issues of law or fact resolved; (5) are costs required to reimburse needy ["prevailing"] defendants; (6) will the costs unduly burden non-affluent ["losing"] plaintiffs; (7) and

> will imposition of costs unduly inhibit future challenges to environmental decisions, thus reducing the effect of substantive environmental protections?

See also Black Hills Alliance v. Regional Forester, 526 F. Supp. 257, 256-60 (D.S.D. 1981) (awarding costs to losing plaintiff in part because plaintiff was of limited means and brought environmental suit in good faith to advance public interest); Schaulis v. CTB/McGraw Hill, Inc., 496 F. Supp. 666, 680 (N.D. Cal. 1980) (declining to award costs to prevailing defendant in Title VII suit because of plaintiff's "modest means").

As evidenced by its order denying costs to the federal defendants, the district court's decision was informed by consideration of the full range of these equitable factors, taken

in light of its familiarity with the facts and its first-hand knowledge of the handling of this case by the parties. In contrast, the three concurring opinions of the Court below exhibit little or no consideration for the equities of this case or the equities underlying Rule 54(d). Senior Judge Nichols, acknowledging that plaintiffs "had a legitimate grievance, whether or not a cause of action," concluded without further explanation that because costs are a "normal consequence of losing," the equities upon which the district court relied were not sufficient to avoid the general rule of awarding costs to the prevailing party. A-14.

The meaning of Judge Nichols' rationale is unclear. If Judge Nichols' opinion means that the district court

should not have considered the limited nature of plaintiffs' resources, the public interest nature of this lawsuit, or the fact that many of the issues raised were issues of first impression, that opinion is contrary to the equitable heritage of Rule 54(d). On the other hand, if Judge Nichols' opinion reflects simply a de novo reweighing of the equitable factors previously considered by the district court, that opinion intrudes upon the discretion traditionally and properly reserved to the district court. Shima v. Brown, 140 F.2d 337 (D.C. Cir. 1943). In either event, Judge Nichols' concurring opinion affords no basis for reversal of the district court's order denying costs.

In his concurring opinion, Judge Posner declares that plaintiffs'

limited means "is entitled to little weight in a case such as this where the defendants are . . . public officials whose expenses of suit were borne by the United States, which is to say by the federal taxpayer." A-25. While Judge Posner may be correct that individual federal taxpayers are also of limited means, this analysis is far removed from the equities underlying Rule 54(d). The proper comparison for purposes of Rule 54(d) is between plaintiffs and the federal treasury, not plaintiffs and individual taxpayers. The financial burden plaintiffs imposed upon the federal treasury and even individual taxpayers by bringing and maintaining this suit is negligible at best; the burden the Court's decision places upon plaintiffs for attempting to

vindicate the policies and goals of the National Housing Act and state and local law is severe.

Although the Seventh Circuit acknowledged in Popeil Brothers, Inc. v. Schick Electric, Inc., 576 F.2d 772, 776 (7th Cir. 1975) that the prevailing party properly could be denied costs in cases involving landmark issues of national importance, Judge Posner's opinion states that "[n]o one takes the landmark argument for forgiving the loser's costs that seriously. . . ." A-26. In the present case, Judge Posner reasons that plaintiffs' attempt to protect and enforce what they perceived to be their rights and the rights of their neighbors under the National Housing Act as well as state and local law "had no reasonable chance of succeeding" and plaintiffs

should not be "rewarded" by denying costs to the prevailing party. Id. Judge Posner's analysis, however, overlooks the premise of the equitable discretion reserved to the district court under Rule 54(d). What is at stake here is the ability of private individuals of limited means to bring suit to advance public rights and public interests as those rights and interests are defined by Congress. No court and no party has ever disputed plaintiffs' good faith in bringing such a suit.

Judge Posner's critique of the merits of plaintiffs' claim also overlooks the opinions of those federal courts which have found merit in private individuals' right to sue public officials under the National Housing Act. In Estrada v. Hills, 401 F. Supp. 429, 433

(N.D. Ill. 1975), for example, Judge Prentice Marshall declared, in a case very similar to this, that the Secretary of HUD could be sued for money damages in connection with his conduct purporting to carry out the statutory and regulatory provisions of the National Housing Act. In the present case, Judge Leighton declared that plaintiffs stated a claim against defendants under the National Housing Act. Even Judge Moran, who granted summary judgment in favor of the defendants, found that plaintiffs could have obtained injunctive relief against the defendants under the National Housing Act. As reflected in his order denying costs to the federal defendants, Judge Moran also found that plaintiffs brought this claim in good faith. In his concurring opinion,

Judge Flaum acknowledges that this case "may have presented novel questions of public interest and importance." A-34. Against this backdrop, Judge Posner's critique on the likelihood of success of this lawsuit should not obscure the real and legitimate interests plaintiffs sought to advance.

Judge Flaum's concurring opinion states that the district court's denial of costs was an abuse of discretion because costs can be denied a prevailing party only if it engages in misconduct in the course of the litigation or if the losing party is indigent. A-34. It is undisputed that the federal defendants engaged in no misconduct and that plaintiffs do not fall within the formal definition of indigency. However, as already discussed, the equitable

discretion of the district court under Rule 54(d) is much broader than that allowed in Judge Flaum's opinion. See discussion at pp. 29-36, supra. Judge Flaum declined to recognize the broader scope of that discretion because, from his perspective, costs are relatively insignificant and, accordingly, "there is no realistic concern that awarding costs to the defendants here will discourage persons from attempting to vindicate their rights in federal court." A-34. Judge Flaum's conclusion, however, overlooks the affidavit filed in the district court by plaintiff Leo Burroughs, Jr., former president of the Five Block Club. From Mr. Burroughs' perspective, the costs of this litigation are extremely significant. In his affidavit, Mr. Burroughs states that

"[a]ny order requiring the plaintiffs to pay the costs requested would work significant and severe economic hardship upon the plaintiff." The court's order imposing such a significant and severe economic hardship on these plaintiffs will discourage future plaintiffs of limited means from attempting to vindicate their rights and, even more disturbing, the public interest, in federal court.

In Boas Box Co. v. Proper Folding Box Corp., 55 F.R.D. 79 (E.D.N.Y. 1971), the court declined to award costs to the prevailing plaintiff because the taxation of costs against the defendant, a "small business struggling to stay alive . . . might very well prove disastrous to the company." Id. at 81. Although the defendant company did not

fall neatly within the formal definition of indigency, the court recognized in the exercise of its equitable discretion that "[i]t would be unfortunate if the threat of the imposition of the ever-increasing costs of litigation were to prevent a party . . . from defending with full vigor a case which it reasonably thought should be decided in its favor. . . ." Id. The court continued:

> It may well be desirable that the potential cost of unsuccessful litigation should act as a deterrent to litigation and an incentive for the parties to settle. But where the antagonists are very unevenly matched in size, resources, and stability, it would be unfortunate to use the possible taxation of costs as a sword of Damocles and so prevent a good faith defense. It is to inevitate such a result

> that the court's discretion is employed in such instances.

Id. Similarly, it would be unfortunate and unfair for this Court to countenance a rigid and formalistic rule on the taxation of costs as a sword to deter future public interest litigation brought in good faith by plaintiffs of limited means.

The inconsistencies of prior decisions on the scope of the district court's discretion under Rule 54(d) reflect that the equities of each case are unique. District courts as well as potential litigants need a consistent framework from this Court with which to assess those equities in a spirit true to the heritage of Rule 54(d). That framework should permit the district court to weigh the historical presumption

in favor of taxing costs for the prevailing party against the public interest character of the lawsuit, the relative merit and significance of the losing party's position, and the capability of the losing party to pay the costs of the prevailing party without extreme hardship.

CONCLUSION

For the reasons set forth above, petitioners respectfully urge that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEO BURROUGHS, JR., et al.,

Petitioners,

v.

CARLA HILLS, Secretary, Department of Housing and Urban Development, et al.,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF APPENDICES

APPENDIX A	Judgment of the United States Court of Appeals for the Seventh Circuit (August 15, 1984)
APPENDIX B	Order of the United States Court of Appeals for the Seventh Circuit Denying Petition for Rehearing and Suggestion for Rehearing en Banc (October 22, 1984)
APPENDIX C	Memorandum Order of the United States District Court for the Northern District of Illinois Granting Summary Judgment (March 8, 1983)
APPENDIX D	Minute Order of the United States District Court for the Northern District of Illinois Denying Taxation of Costs (May 10, 1983)
APPENDIX E	Memorandum Order of the United States District Court for the Northern District of Illinois Denying the Motions to Dismiss
APPENDIX F	Relevant Statutory and Regulatory Provisions

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 83-1604, 83-2289

LEO BURROUGHS, JR., ET AL.,

Plaintiffs-Appellants, Cross-Appellees,

v.

CARLA HILLS, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 1604—**James B. Moran,** *Judge.*

ARGUED APRIL 11, 1984—DECIDED AUGUST 15, 1984

Before POSNER and FLAUM, *Circuit Judges,* and NICHOLS,* *Senior Circuit Judge.*

PER CURIAM. The court is unanimously of the opinion that the decision of District Judge Moran on summary judgment dismissing the petition, ought to be affirmed, and judgment is entered to that effect. The court is also unanimously of the opinion that the decision of the same district judge, denying costs to the prevailing parties,

---

* The Honorable Philip Nichols, Jr., of the United States Court of Appeals for the Federal Circuit, is sitting by designation.

ought to be reversed, and judgment is entered to that effect. The judges of this panel differ somewhat in stating their reasons and, therefore, the views of each judge are separately appended. However, Judge Posner joins in Judge Nichols' opinion except Part IV B, and except for that part, it may therefore be taken as the opinion of the court. Affirmed in No. 83-1604 and reversed in No. 83-2289.

NICHOLS, *Senior Circuit Judge.* This action was brought in the Northern District of Illinois by eight individuals and a voluntary community organization, against former Housing and Urban Development (HUD) Secretary Carla Hills, various regional and local HUD officials, and Seward Rist, Area Management Broker. Hills is no longer Secretary, but successors have not been formally substituted as parties. Plaintiffs originally sought injunctive relief but now seek money damages only, on account of injury they allege they suffered as nearby residents because defendants allowed certain Chicago residential property acquired by foreclosure to be vacant and a hazard to health and safety of community residents from acquisition, November 1974, through disposal, July 19, 1976, all contrary to Federal law, state law, municipal ordinance, and in Mr. Rist's case, his contract. A motion to dismiss was early denied, but this holding is passed over here because not assigned as error in any party's appeal. The injunctive relief issue has been considered mooted since the disposal of the property shortly after the suit was filed.

On March 8 and 10, 1983, District Judge Moran, having before him cross-motions for summary judgment and a fact stipulation signed by all the parties, granted defendant's motion and dismissed the petition, but denied the defendants their costs. *Burroughs v. Hills*, 564 F. Supp. 1007 (N.D. Ill. 1983). This appeal followed and there is a cross-appeal relating to costs only.

I

Facts

The stipulated facts represent a somewhat unhappy situation from the Federal taxpayer's point of view. The case is said to be representative of others, and a test. The property in question is a three-story residential structure at 7228 S. Coles Avenue in Chicago. Becoming titleholder by foreclosure, HUD allowed the building to be unoccupied and unguarded, with no watchman on duty, and unfenced. Glass was broken throughout, rats, mice, other rodents and insects were present, foundations were cracked, exterior walls needed tuckpointing, floors were unstable, exterior doors were unsecured, the front steps and back porch were in disrepair, debris was scattered around the building, including rubble, refuse, and lumber material "knocked down by vandals" for whom the building was "a frequent target." Mr. Rist as contract "area management broker" (AMB) inspected seven times and reported the building was secured, the windows boarded, the grass cut, and the lot free of debris. (Evidently the parties mean to imply that Mr. Rist reported falsely.) Mr. Rist had the management of 150-200 government-owned buildings and so far as appears is the only defendant who actually saw this property, but the official defendants had independent means of knowing what was occurring so far as they were aware of plaintiffs' complaints.

HUD originally considered the property had a fair market value of $40,000, less needed repairs at $17,389, making it available at $22,600. Some $285 was spent on maintenance pursuant to Mr. Rist's invoices. HUD paid all the taxes. On July 19, 1976, HUD sold the property to the city for $1, which could, under the applicable program, be done only if the appraised value was under $5,000. Chicago conveyed it to the South Shore Senior Citizens Association, which was stipulated to be proceeding with repairs estimated to cost over $40,000, to be financed by HUD by "block grant." Thus the stipulated facts indicate a precipitate decline in market value dur-

ing the period of HUD ownership, and we assume that this occurred, with an increase in the repairs needed.

Plaintiffs are eight individuals who resided as tenants within 500 feet of this derelict property, plus the Five Block Club, a voluntary organization formed for the purpose of combating neighborhood blight. The interest of the individual plaintiffs was their concern for the health and safety of themselves and their families. They feared increased crime and drug activity because the building was "a likely hideout for criminals and gangs." They routinely passed the immediate area and saw the building each day. None of them claim to own any real property in the neighborhood.

We note that dwelling within 500 feet of such an offending structure is a fact that confers special status under Illinois law, whether one is owner or tenant. If his property *or person* are "substantially affected" by an alleged violation, in addition to other remedies, he may sue for injunction, without having to "prove any special or unique damage to himself or his property from the alleged violation." Chapter 24, paragraph 11-13-15 of Illinois Revised Statutes, as amended and in effect when the complaint was filed.

Plaintiff Burroughs first complained to defendant Waner on March 19, 1975, and on April 2 the Five Block Club presented Waner with petitions signed by 107 members, one of whom oddly enough was defendant Rist. At that time they urged immediate sale to a buyer who would rehabilitate. They frequently communicated afterwards to Mr. Rist, but it is stipulated that the official defendants obtained no more information as to the bad condition of the building until the suit was filed. The stipulation describes their duties, from which we are perhaps expected to infer that it was their duty to know. Mr. Rist was a party to a contract with the government by which he was to perform, as to properties to which HUD acquired title, various services including inspection, and taking the necessary steps when repairs were found necessary.

The stipulation closes with a curious provision that if the official defendants are liable, they are liable jointly and severally in the amount of $1,000, and if Rist is liable, it is in the amount of $350. The stipulation is silent, and we are not informed what liability might be asserted in companion cases, if any, should what we here hold suggest such liabilities and what we say treated as *stare decisis*.

II

Theory of the Action

Defendant Hills and the other official defendants are held by plaintiffs to be liable in their official capacities under Federal law. The official defendants, except Hills, are said to be liable in their individual capacities also under Federal law. Mr. Rist is liable under his contract with HUD, and under state and local law, they contend.

The district judge also dealt with what he considered to be pendent jurisdiction claims under the doctrine of *United Mineworkers of America v. Gibbs*, 383 U.S. 715, 726 (1966). He pointed out that under the state law relied on, injunctive relief only is provided and he denied damages on that ground. Plaintiffs do not argue any reason why this is erroneous. This, however, does not preclude consideration of local law because in HUD operations, as we will point out, Federal law requires property management in conformity to local law, and thus if a breach of state law occurs, it may *ipso facto* be a breach of duties under Federal law, and it may not be necessary for the court to rely on pendent jurisdiction. HUD properties do not become like some Federal properties, enclaves exempt from local law. *Merrill Tenant Council v. HUD*, 638 F.2d 1086 (7th Cir. 1981).

Plaintiffs admit that the National Housing Act, 12 U.S.C. § 1701 and ff is the authority under which the United States insured and then foreclosed the mortgage on the involved property, becoming owner of record, and under which the Federal defendants acted. 12 U.S.C. §§ 1713(k), 1710(g). They also admit that the act contains

no language expressly authorizing suits against the Secretary of HUD, or any of her subordinates, to enforce official or personal liability for not executing the granted powers in a proper manner. The theory of the action, in its most basic form therefore, is that the litigation rights asserted herein are among those which can be held to have been implied by the legislative scheme, according to the standards stated in *Cort v. Ash*, 422 U.S. 66 (1975) or in the progeny of that case.

Insofar as the suit is against the defendant officers in their official capacities, it is understood by the parties and held by the district judge, that the Secretary may sue and be sued in her official capacity by 12 U.S.C. § 1702 which, as a practical matter, means that the "Mortgage Insurance Fund," or possibly other government funds, may be used to pay judgments and that issues of sovereign immunity and consent to be sued are eliminated. *Merrill Tenant Council v. HUD, supra* at 1091. But section 1702 does not of its own force create a private cause of action. *Shivers v. Landrieu*, 674 F.2d 906, 911 n. 21 (D.C. Cir. 1981). It would seem that so far as official funds are concerned, naming the Secretary as a defendant suffices and other officials need not have been joined.

The pleadings, the stipulations, and pronouncements of counsel make it clear, however, that personal damages recoverable from individual officials are also sought. Originally this is on a tort theory. Evidently this mulcting of personal rather than official funds would make some changes in application of the *Cort v. Ash* factors: the detriment to other beneficiaries of the program by depletion of available housing funds would be eliminated, but on the other hand, there would be created a disincentive to anyone accepting appointment as a HUD official. These differences between the two kinds of relief sought are surprisingly little discussed by the parties, and the district judge seems to disregard the possibility that the official defendants, except Hills, may be personally liable.

The theory of Mr. Rist's liability is necessarily a little different. He contracted to do things for HUD which, had

he done them, would have lessened or eliminated any detriment to the plaintiffs. They presumably sue him as third-party beneficiaries under his contract. *Cf. Merrill Tenant Council v. HUD, supra* at 1093. This may eliminate *Cort v. Ash* as controlling authority in his case, but if they are to show that they were intended contract beneficiaries, they must have to make a showing that in effect he was working for them.

The supposed pendent state law claims are really claims that the policy of the Housing Act, 12 U.S.C. § 1701 and ff, requires that when HUD becomes owner of real property located within sovereign states, acting under the General Welfare clause and not under specific Federal constitutional grants of power, HUD must conform to construction codes, etc., of local law just as the previous but now foreclosed mortgagors had to do. The existence of such a policy of law is not in dispute and is illustrated by quotes from HUD documents which need not be detailed. For example, Mr. Rist's contract required him to prepare local tax returns and see that HUD was duly advised of tax liabilities. It is therefore plain that plaintiffs can, as they do, buttress their Federal claims by references to breaches of local law.

III

Statutes, Regulatory Provisions, and Contract Provisions Relied On

These are placed in Appendix A and are given verbatim as plaintiffs quote them in their brief.

The HUD Handbook is quoted and relied on by plaintiffs as a government regulation. It appears on its face to be intended for internal use for the information and guidance of HUD officials. Such handbooks are usual in the Executive Branch of the United States Government. Uncertainty often exists whether a handbook is meant to be, or is inadvertently made to be, an independent source of legal rights or claims against the United States Government and its officials. See treatment of this problem in

Fiorentino v. United States, 607 F.2d 963 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1083 (1980). *See also Litton Systems, Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1439 (Fed. Cir. 1984), which says of the *Manual of Patent Office Examining Procedure*, "[t]he MPEP has no binding force on us, but is entitled to notice so far as it is an official interpretation of statutes or regulations with which it is not in conflict." That is the weight we give the HUD Handbook here. Mr. Rist's contract is on a standard government form for Area Brokers.

IV

Discussion

A. *The principal appeal.*

In view of the very conspicuous inability of the plaintiffs to cite any statute granting them expressly a right to sue in the Federal courts on account of the kind of inadequate performance by HUD officials described in the stipulation, or by their contractors, it is necessary for them to show that Congress granted them by implication a right to sue under a *Cort v. Ash* analysis. They undertook to make such a showing to the district court and partly persuaded it. Judge Moran held, to summarize briefly his carefully reasoned analysis, that a breach of duty owed towards these plaintiffs clearly occurred, but to enforce it by money damages in his court would be counterproductive because it would "ultimately come from the pocket of a beneficiary" meaning apparently that payment would deplete the Mortgage Insurance Fund and that it would provide "some balm to some undefined and virtually undefinable class of people for continuing coexistence with substandard housing" but not even necessarily deter future derelictions of duty by HUD officials; the theory here again being that funds would be diverted to give balm to aggrieved individuals rather than being used to bring housing up to standard. Here again there seems to be the unspoken assumption that the HUD defendants are sued only in their official capacities and will not be re-

quired to make plaintiffs whole out of their own pockets. The stipulation does not say this and we fail to see where it so implies. It says all named defendants are "obligated" to pay the sums stated. The official group are "jointly and severally obligated." If public funds were to be used, it would have sufficed to say that the Secretary was "obligated." Moreover, the class of possible claimants is not all that open-ended. They were not certified as a class, but they defined themselves as persons dwelling within 500 feet of the offending structure. This is treated as a distinct category under local law, conferring standing to enforce local statutes as we have shown.

Judge Moran's analysis places him in the position of one perceiving the occurrence of a legal wrong yet denying any remedy to the persons wronged. This does not, by itself, establish that he is in error, but it does invite our thoughtful analysis. Though we agree with Judge Moran's result, we deem it necessary to undertake our own *Cort v. Ash* analysis, adding ourselves to the many other circuit judges who have undertaken this task in line of duty.

To understand *Cort v. Ash* fully, it is necessary to note that it is a case where the proponent of an implied cause of action lost, by unanimous vote of all the Justices. The four standards explain why that claimant lost. Had he won, their meaning might be different. It is always an error to separate statements by Justices or judges from their context. The questions there stated to be the right ones are summarized. (422 U.S. at 78.)

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted?" [Emphasis in original.]
>
> Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
>
> Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy?
>
> Finally, is the cause of action one traditionally relegated to state law?

Appellants make a valiant effort to show their entitlement to an implied Federal cause of action under all four *Cort v. Ash* factors, but it is suggested that this court in *Indiana National Corp. v. Rich*, 712 F.2d 1180, 1182 (1983), treated the *Cort v. Ash* factors as somewhat outmoded. We cited *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) as establishing that the "factors were not of equal weight, but that the central inquiry, at which the first three factors were all directed, was one of congressional intent." We referred also to *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979) which anticipates Judge Moran in allowing implication of some private remedies, but denying enforcement by money damages. We do not think later Supreme Court cases, if they really modify *Cort v. Ash*, do so in a manner helpful to appellants' case. It cannot be unfair to them to make a full *Cort v. Ash* analysis, whether or not their failure on the second or intent issue is by itself decisive. We surmise that any dissatisfaction with the factors arises from cases, such as *Touche Ross* where the intermediate courts have applied them too readily in favor of an implied cause of action.

In applying the first *Cort v. Ash* factor, we ask if nonproperty owners residing within 500 feet of an offending structure are persons for whose "especial benefit the statute was enacted." Here we need not doubt that Congress and the agency, HUD, all wanted the Housing Act to be admininstered in such a way that plaintiffs' class and others would not be avoidably harmed. The damage they might suffer from the neighborhood of dilapidated, abandoned, or vandalized government-owned structures was foreseen and so far as possible guarded against. But, bearing in mind that the necessity of foreclosure arises when a primary program has already failed, and that the object of administration between foreclosure and disposal is clearly to limit or avert the government's fiscal loss, and replenish the insurance fund, can it possibly be said the plaintiffs are *special* beneficiaries?

As regards the second factor, there is no indication of congressional intent to create a legal remedy, *i.e.*, a lawsuit, either in the statutory text or in the legislative history. There is plenty of evidence of expectation, if the HUD officials do a proper job, keeping the premises in repair, stopping vandalism, excluding drug users and criminal gangs, it will benefit the public fisc and incidentally make a better community. Plaintiffs are not enforcing a property right by the instant suit, for they claim to have none. They are not contract claimants. The idea that they have special rights by virtue of membership in the class of persons dwelling within 500 feet of the offending structure, stems from state law giving them access to state courts if they are in that category. It is not at all apparent that Congress intended to give special benefits to members of that identifiable group, in one particular state, in the special form of entry to the Federal courts to bring a lawsuit, where no such right is granted to others who might suffer incidental or indirect injury elsewhere if HUD officials do not do a proper job. No legislative history is cited to supply what the statutory language clearly does not supply.

It is not in any way inconsistent to say that Congress intended HUD officials to conform to local law in their management of foreclosed property in that location, yet that Congress did not intend the vagaries of other local law to confer implied causes of action on persons in that locality even though no such cause might have been implied in other localities.

As to the third factor, the remedies asserted are not consistent with the underlying legislative scheme. The officials are expected to act promptly as responsible businessmen would if similarly situated, for example, officers of a bank which has had to foreclose and finds itself willy-nilly in the business of real estate management and disposal. An invitation to Federal judges to peer over the shoulders of the management and interfere in the details of this business, would not further the underlying purposes. We are not here concerned with public-owned

facilities, such as post offices, in whose management the public has an abiding interest lacking here. Enforcement by damages assessed against officials individually, as here proposed, would tend to make HUD management reluctant to foreclose, and thus they might fail to make the best use of the tools given them, the mortgage instruments, to limit and control government financial loss. Or are we also to visualize suit by members of the 500-foot class against HUD officials who have *failed* to foreclose?

Finally, the fourth *Cort v. Ash* factor is the only one which is even neutral so far as plaintiffs are concerned. The assessment of damages against Federal officials for nonperformance of official duties is not one normally relegated to state law.

The four factors, taken all together, fail to support the implication of a private remedy in the Federal courts under the housing legislation, of any form or description. That the HUD officials appear by the stipulation (as they do) not to have done things they ought to have done, is true, but irrelevant. They owe their primary duty to their employer, the United States Government, and that employer has ample means at its disposal to enforce diligence by them, if it chooses to exercise its rights and sees them as thwarting its purposes.

Efforts to enforce implied causes of action under the National Housing Legislation or the HUD Handbook, have frequently come under consideration of appellate courts, and have always failed. Cases are:

> *M. B. Guran Co. v. City of Akron*, 546 F.2d 201 (6th Cir. 1976)—(Disappointed bidder's suit to enjoin award of a HUD-subsidized contract in alleged violation of a HUD Handbook. Court applies *Cort v. Ash* factors and states that the persons for "whose especial benefit the statute was enacted" are those who inhabit inadequate housing.)
>
> *Falzarano v. United States*, 607 F.2d 506 (1st Cir. 1979)—(No *Cort v. Ash* implied right of action accorded to tenants of HUD-subsidized housing for low, moderate income persons.)

City of Rohnart Park v. Harris, 601 F.2d 1040 (9th Cir. 1979)—(Suit by city as *parens patriae* on behalf of persons injured to enjoin HUD and developers from developing a regional shopping center as part of a urban renewal project. Violation of various rules of Housing Act alleged. *Cort v. Ash* factors applied adversely to city.)

Shivers v. Landrieu, 674 F.2d 906 (D.C. Cir. 1981)—(Past and present tenants of HUD mortgage-insured property have no right under *Cort v. Ash* standards to sue to enforce compliance with HUD regulations.)

Jackson v. Lyons, 506 F.2d 233 (D.C. Cir. 1974)—(No implied right of action against HUD for insuring housing that did not conform to D.C. Housing Regulations, contrary to Section 221(d)(2) of Housing Act. This case decided before *Cort v. Ash*.)

In *United States v. Winthrop Towers*, 628 F.2d 1028 (7th Cir. 1980), this court reviewed the legality of a HUD foreclosure in a foreclosure suit brought by HUD. However, it held that HUD's main duty was to the mortgagee, not the mortgagor, and that negligent management and inspection were not affirmative defenses. That conclusion seems to accord with ours.

Mr. Rist by his contract undertook to perform duties as to management of foreclosed properties that otherwise the defendant HUD officials would have had to perform themselves. By his contract, he was to render various services as set forth in the appendix. There is nothing in the contract to show he was working for any outside persons as third-party beneficiaries. His duty was to protect the fiscal interests of the government. Nor does it appear that the *Cort v. Ash* factors work out more favorably for plaintiffs in their suit against him, than they do as to the HUD officials.

The short of it is that there are no provisions that express or imply an action in the Federal courts based on the kind of nonfeasance stipulated here. Since no such ac-

tion is shown to lie, the question if it did lie, what kind of relief would be available to plaintiffs who have proved their case, whether injunction, declaratory judgment, or money damages, is an issue simply not reached. So far as the duties of the Federal officials included conformity to local law, this conclusion embraces those laws as well as Federal law.

As a matter of pendent jurisdiction, and as a separate issue, and in his discretion, the district judge also or again took up the breaches of local law that are stipulated, and held that by local law injunctive relief only was allowed. Since such relief was no longer sought, he entered summary judgment on the state claims as well. We do not understand that this part of his decision is before us on this appeal and therefore no further consideration of it is called for. We affirm the summary judgment as entered.

B. *The cross-appeal.*

The official defendants cross-appeal respecting the refusal of the district judge to award costs to them, having decided in their favor. In his order he noted that the case, though not a "landmark," did present novel questions of public interest and importance, that plaintiffs were of limited means (not stated to be indigent) and were not suing for commercial advantage or private gain. He cited *Delta Air Lines, Inc. v. Colbert*, 692 F.2d 489 (7th Cir. 1982). These grounds for relieving a loser from what is by Fed. R. Civ. P. 54(d) the "of course" normal consequence of losing, are not by themselves sufficient to avoid abuse of discretion under the rule.

This conclusion sufficies to dispose of the cross-appeal, and any discussion whether the suit was frivolous is tempting though not strictly relevant. It cannot be denied that plaintiffs had a legitimate grievance, whether or not a cause of action. By the commonly accepted belief of the lay public, one thinking he has such a grievance has a Constitutional right to sue in the most convenient court, without too nice a study of the jurisdiction and juris-

prudence of the selected tribunal. If he has chosen the wrong one, its judge is not aggrieved because he has only to throw the case out or transfer it to the proper court. Understandably this view lacks a following among judges, but all must be aware of its existence as a tide they must swim with or against. What use is made of the first opportunity afforded under the Rules of the chosen court to get rid of a misfiled case thus takes on more importance than many realize. To use this opportunity, if the case does not belong in the court chosen, is to swim with the tide, so to speak, whereas to labor on with the case is not. Here, the first opportunity was a motion by defendants to dismiss on the pleadings, that came before another district judge, not Moran. Under date of October 11, 1978, it was held that the motion was denied because a cause of action was stated under 42 U.S.C. § 1441. (See Appendix for text of this section). Record Vol. I, Item 27. It appears the denial was legal error as the petition did not state a cause of action within the limited jurisdiction of the Federal courts—could not have if our decision is right. This act lent dignity to the case and set the stage for the forensic combat that followed. It was made unethical for counsel not to prosecute the claim as he did. In these circumstances, responsibility for causing waste of judicial resources on an unmeritorious case does not rest wholly or even primarily upon plaintiffs and their counsel. Here the cause was failure of the judicial machinery to operate as it was intended to under the F.R.C.P.

APPENDIX A

Relevant Statutory Provisions

The Housing Act of 1949, 42 U.S.C. § 1441, provides in pertinent part:

> The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation . . . . The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established . . . .

The Department of Housing and Urban Development Act, as amended, 42 U.S.C. § 1441a, provides:

> (a) The Congress finds that the supply of the Nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949, of the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family". The Congress reaffirms this national housing goal and determines that it can be substantially achieved within the next decade by the construction or re-

habilitation of twenty-six million housing units, six million of these for low and moderate income families.

(b) The Congress further finds that policies designed to contribute to the achievement of the national housing goal have not directed sufficient attention and resources to the preservation of existing housing and neighborhoods, that the deterioration and abandonment of housing for the Nation's lower income families has accelerated over the last decade, and that this acceleration has contributed to neighborhood disintegration and has partially negated the progress toward achieving the national housing goal which has been made primarily through new housing construction.

(c) The Congress declares that if the national housing goal is to be achieved, a greater effort must be made to encourage the preservation of existing housing and neighborhoods through such measures as housing preservation, moderate rehabilitation, and improvements in housing management and maintenance, in conjunction with the provision of adequate municipal services. Such an effort should concentrate, to a greater extent than it has in the past, on housing and neighborhoods where deterioration is evident but has not yet become acute.

The National Housing Act, 12 U.S.C. § 1713, provides in pertinent part:

(k) *Acquisition of property by conveyance or foreclosure.* The Secretary is hereby authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion . . . .

> (l) *Handling and disposal of property; settlement of claims.* Notwithstanding any other provisions of law relating to the acquisition, handling, or disposal of real and other property by the United States, the Secretary shall also have power, for the protection of the interests of the Genera' Insurance Fund, to pay out of the General Insurance Fund all expenses or charges in connection with, and to deal with, complete, reconstruct, rent, renovate, modernize, insure, make contracts for the management of, or establish suitable agencies for the management of, or sell for cash or credit or lease in his discretion, any property acquired by him under this section . . . .

The National Housing Act, as amended, 12 U.S.C. § 1702, provides, in pertinent part:

> The powers conferred by this Act shall be exercised by the Secretary of Housing and Urban Development (hereinafter referred to as the "Secretary"). In order to carry out the provisions of this title and titles II, III, V, VI, VII, VIII, IX, X, and XI, the Secretary may establish such agencies, accept and utilize such voluntary and uncompensated services, utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, [and appoint such other officers and employees as he may find necessary . . . .] The Secretary shall, in carrying out the provisions of this title and titles II, III, V, VI, VII, VIII, IX, X, and XI be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

Ill. Rev. Stat. ch. 24, § 11-31-1, as amended, provides, in pertinent part:

> § 11-31-1. The corporate authorities of each municipality may demolish, repair or cause the demolition or repair of dangerous and unsafe buildings or uncompleted and abandoned buildings within the ter-

ritory of any such municipality . . . . No building may be boarded up or otherwise enclosed.

The Municipal Code of the City of Chicago, § 39-13, provides, in pertinent part:

> 39-13. Any person or persons owning, maintaining, operating, collecting rents for, or having any legal or equitable interest in any vacant and open building, or any uncompleted abandoned building, or any vacant boarded-up building or any otherwise enclosed vacant building must have a watchman on duty upon the premises on which any one of such aforementioned buildings is situated every day continuously between the hours of 4:00 P.M. and 8:00 A.M.
>
> Said watchman required under the provisions of this ordinance shall remain on duty daily during the required hours until such building is either occupied or razed . . . .

The Municipal Code of the City of Chicago, § 99-4, provides, in pertinent part:

> 99-4. No building, vehicle, structure, receptacle, yard, lot, premises, or part thereof, shall be made, used, kept, maintained, or operated in the city if such use, keeping, maintaining, or operating shall be the occasion of any nuisance, or shall be dangerous to life or detrimental to health.
>
> Every building or structure constructed or maintained in violation of the building provisions of this code, or which is in an unsanitary condition, or in an unsafe or dangerous condition, or which in any manner endangers the health or safety of any person or persons, is hereby declared to be a public nuisance. Every building or part thereof which is in an unsanitary condition by reason of the basement or cellar being covered with stagnant water, or by reason of the presence of sewer gas, or by reason of any portion of a building being infected with

disease or being unfit for human habitation, or which by reason of any other unsanitary condition, is a source of sickness, or which endangers the public health, is hereby declared to be a public nuisance.

Relevant Portions of the HUD Property Disposition Handbook

Paragraph 23, Chapter 2, of the HUD Handbook provides, in pertinent part:

b. *The repair program* shall include all repairs necessary to create maximum sales appeal and eliminate existing or potential structural, mechanical and other deficiencies. In addition, the repair program should include such upgrading which, because of type and location of the properties, the Director determines necessary to generate sales, or to stabilize or improve neighborhoods. In establishing the repair program, particularly where inner-city, core-area properties are involved, it is important to be aware of the salutary effect that will probably result. The timely provision of repair or substantial rehabilitation may be critical to the preservation of blocks and even neighborhoods in older areas of our cities and suburbs. Typically, in older but still sound neighborhoods, the rehabilitation of one house on the block can lead to investment in upgrading other houses on the block. The result of the repair program with respect to deteriorating or substandard housing should be to create a structure in like-new condition, with all components operable, and with no major expense in the offing for several years. All major repair work shall be accomplished in accordance with established formal contracting and purchase order procedures.

* * *

g. *Immediate Protective Repairs.* Irrespective of whether full repairs are delayed, immediate at-

tention shall be given to those repairs required to prevent undue deterioration and eliminate hazardous conditions that may be dangerous to the public.

h. *Initial Cleanup and Maintenance.* It is essential that unsightly conditions be corrected promptly. Immediately upon taking possession the Area Management Broker (AMB) or the local office, if an AMB is not available, shall make arrangements to have all rubbish removed and the premises given a thorough cleaning, including cutting of grass, weeding, and trimming of shrubbery if needed.

i. *Continued Maintenance.* In addition to the initial cleaning, arrangements shall also be made for continued "housekeeping" maintenance, such as care of shrubbery and lawns, snow removal and broom cleaning. Unoccupied properties must be maintained in clean and presentable condition.

Paragraph 185, Chapter 7 of the HUD Handbook provides, in pertinent part:

Repair and Maintenance Objectives.

a. *The overall objective* is to (a) place properties in first-class condition to create maximum sales appeal at the highest obtainable sales price in order to contribute to maintenance of a firm real estate market; (b) eliminate potential default hazard attributable to physical deficiencies; and (c) eliminate all structural, (including termite infestation) mechanical and surface deficiencies which, if not eliminated, would result in major repair or replacement expenditures by the purchaser, or demands upon HUD under the terms of the warranty on the Sales Contract, Form 2384.

Paragraph 80, Chapter 3, of the HUD Handbook, provides in pertinent part:

80. *Supervision of Area Management Brokers.* In order to obtain quality performance on a timely basis, the CPO shall be responsible for assuring that each area management broker (AMB) understands what is expected of him, and that he is familiar with the standards of acceptable performance established by the local office for all activities under his supervision. The CPO shall supervise the activities of each AMB to the extent necessary to develop and maintain top quality management services. Where an AMB is new to the program, the CPO shall expend a sufficient amount of time, either personally or by a qualified staff member, in training and supervising the AMB and his employees who are engaged in performing the services required under the broker contract.

Relevant Portions of Seward Rist's AMB Contract

The AMB Contract, Article 3, provides, in pertinent part:

> ARTICLE 3.-FACILITIES, MATERIALS, LABOR AND SERVICES TO BE FURNISHED BY THE CONTRACTOR:
>
> In consideration for compensation as stipulated in this contract the Contractor agrees to perform in accordance with the following requirements at no additional expense to the Government except as provided herein.
>
> * * *
>
> d. SERVICES: The requisite time, attention and effort of the principals and employees regularly engaged in the established business of the Contractor to properly discharge the obligations and responsibilities of the Contractor as established hereunder, including supervision of all repair, maintenance and operating activities.

The AMB Contract, Article 4, provides, in pertinent part:

> ARTICLE 4.-INITIAL SERVICES TO BE *PERFORMED* BY THE CONTRACTOR
>
> The Contractor shall perform the following initial services stipulated with his regular employees at no additional expense to the Government.
>
> d. Informing the Government promptly concerning all damage resulting from vandalism, fire, windstorm, and other causes at the outset and thereafter as circumstances require.

The AMB Contract, Article 5, provides:

> ARTICLE 5.-INITIAL SERVICES TO BE *OBTAINED* BY THE CONTRACTOR
>
> The Contractor shall arrange for and supervise the following initial services in accordance with all the terms and conditions herein and specifically Article 9 and the limitations imposed under Article 10. The actual repair or maintenance costs shall be reimbursable from project funds or through the U.S. Treasury, or paid direct by the Government through the U.S. Treasury, as appropriate.
>
> a. Winterizing of all operating systems and equipment, as to all properties vacant at the outset or subsequently vacated or at such other time as conditions require;
>
> b. Removal from the premises of all trash and debris, both as to interior and grounds;
>
> c. Securing the properties against unauthorized entry and damage by the elements at the outset and thereafter as needed;
>
> d. Mowing the grass and trimming the shrubbery[.]

The AMB Contract, Article 7, provides in pertinent part:

ARTICLE 7.-CONTINUING SERVICES TO BE *OBTAINED* BY THE CONTRACTOR

The Contractor shall arrange for and supervise the following continuing services in accordance with all the terms and conditions hereof and specifically Article 9 and the limitations imposed under Article 10. The actual repair or maintenance costs shall be reimbursable from project funds or through the U.S. Treasury, or paid direct by the Government through the U.S. Treasury, as appropriate.

a. Continuing maintenance of buildings and grounds

. . . .

The AMB Contract, Article 8, provides, in pertinent part:

ARTICLE 8.-CUSTODIAL SERVICES:

The Contractor shall perform custodial services on vacant properties assigned hereunder which are encumbered by mortgages assigned to the Secretary under contracts of mortgage insurance or when the property has been abandoned and the Secretary holds a purchase money mortgage taken back in connection with the sale of such property or other form of legal possession of which the Secretary does not hold free and clear title to such property.

Contractor shall also provide for the protection and preservation of such properties. However, actions of this nature shall be limited to those necessary for the prevention of health hazards and minimum security measures to prevent damage to the property by the elements or by vandalism.

POSNER, *Circuit Judge*, concurring. I join Judge Nichols' opinion, but his laconic disposition of the cross-appeal leads me to add a statement of my own view of why the district court's refusal to award the defendants, as the winning parties, their costs of suit under Rule 54(d) should be reversed.

Under the rule, "costs shall be allowed as of course to the prevailing party unless the [district] court otherwise directs." As an original matter this language could be interpreted to give the district judge an essentially unreviewable discretion to award or not to award costs to the winning party as the judge pleased. But this court has not interpreted the rule thus. We have said it establishes a " 'principle of preference' " (quoting Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 768 (1982)) that in all but exceptional cases requires the judge to award costs to the winning party, whether plaintiff or defendant. See *Coyne-Delany Co. v. Capital Development Bd.*, 717 F.2d 385, 392 (7th Cir. 1983); *Delta Air Lines, Inc. v. Colbert*, 692 F.2d 489, 490 (7th Cir. 1982); *Poweil Bros., Inc. v. Schick Elec., Inc.*, 516 F.2d 772, 774-76 (7th Cir. 1975). Since "the ingredients of a proper decision [to withhold costs] are objective factors . . . accessible to the judgment of a reviewing court," *Coyne-Delany Co. v. Capital Development Bd.*, *supra*, 717 F.2d at 392, we must determine whether such factors are present here.

The plaintiffs argue only two factors. The first, that they are persons of limited monetary means, is entitled to little weight in a case such as this where the defendants are (with the exception of a broker hired by HUD to manage the property in question) public officials whose expenses of suit were borne by the United States, which is to say by the federal taxpayer. Most taxpayers are persons of limited means; most government revenue is raised from such persons, and not from the wealthy few. The denial of costs to the defendants in this case will not contribute, however slightly, to a more egalitarian distribution of the nation's wealth.

The second factor that the plaintiffs ask us to consider is whether, if they had won the case, it would have been

a "landmark" decision; they argue that the efforts of litigants who press for fundamental changes in the law should be subsidized, lest the high risk of losing deter such litigants. I question the validity of this argument in today's legal climate. The federal courts are choking with litigation, much of it completely meritless; fear of losing seems not to be much of a deterrent. And to reward the loser of what would have been a landmark case if he had won creates the following paradox: the more frivolous the suit, the greater the landmark it would establish in the unlikely event that it succeeded, and hence the stronger the argument for denying the winner his costs. A successful suit to overrule *Brown v. Board of Education*, 347 U.S. 483 (1954), and thus make racial segregation in public schools once again lawful, would be one of the all-time legal landmarks. No one takes the landmark argument for forgiving the loser's costs that seriously; no one argues for interpreting Rule 54(d) to encourage the bringing of lawsuits that have no reasonable chance of succeeding, merely because if they did succeed they would work a legal revolution. The present lawsuit had no reasonable chance of succeeding, and in fact borders on the frivolous.

As part of its program for subsidizing the housing needs of veterans, the poor, and others, HUD guarantees mortgage loans on houses in which members of these groups live. It is said that the high rate of default on its loans to owners of housing for poor people has made HUD, through foreclosure, the biggest owner of slum property in the United States. After foreclosure, with the property standing tenantless, deterioration often is rapid and complete, and was in this case, where HUD lost its entire investment in the property and the neighbors got a blight, an eyesore, and maybe even a menace, to contend with. Such are the unintended effects of public benevolence. They are very unfortunate; but to think, as these plaintiffs did, that the federal courts are authorized to provide a remedy is wishful thinking. They would be authorized only if there had been an invasion of the plaintiffs' federal legal rights; but as Judge Nichols explains, there is nothing in 42 U.S.C. § 1441a, the statute on which

this suit is founded, to suggest that Congress meant to provide legal protection to neighbors of subsidized housing from the side effects—foreclosure, abandonment, deterioration—of federal housing subsidies. When the statute speaks of " 'a suitable living environment,' " "the preservation of existing housing and neighborhoods," and "neighborhood disintegration" and "deterioration," it is referring not to the neighbors of the subsidized homeowners but to the subsidized homeowners themselves. It is their living conditions, not those of their neighbors, that the subsidy programs seek to protect and improve. To give the neighbors rights of action against HUD and its officials—whether equitable, to force HUD to spend whatever money is necessary to prevent a building that it has taken over by foreclosure from deteriorating, or legal, to compensate the neighbors for the nuisance created by HUD's neglect—will only compound the cost to HUD of having to foreclose on its loans. Instead of just having to write off a loan, which is bad enough, HUD would, under the plaintiffs' interpretation of the statute, have to pay out additional money to the mortgagor's neighbors—money that would otherwise be available to improve the stock of housing. The program would be made more expensive, and the intended beneficiaries would obtain no net benefit from the additional expenses. The plaintiffs ask us to bring about this result by playing a purely verbal trick: defining "neighborhood" to mean the set of neighbors of subsidized housing, though in the statute the word simply means the area where the inhabitants of subsidized housing live. Compare Neighborhood Development Programs Act, 42 U.S.C. §§ 1469 *et seq.*

In tracing out the likely consequences of the plaintiffs' interpretation of the statute, I have assumed that they are seeking damages just from HUD. The idea that Carla Hills, who was President Ford's Secretary of Housing and Urban Development, might be personally liable for the untoward consequences of HUD's programs during her tenure—a liability that might run into the hundreds of millions of dollars—is almost too silly for words, especially when one considers that there is no indemnification of

federal officers against whom a judgment is levied. But public liability would be bad enough. It would as I have said increase the costs of the government's housing programs and do so for the benefit of those frequently implacable opponents of the programs, the neighbors of the subsidy recipients. See, e.g., *Gautreaux v. Pierce*, 707 F.2d 265 (7th Cir. 1983). To seek a warrant for such liability in the housing law itself requires the exercise of an inflamed rather than merely creative legal imagination and should not be encouraged by giving the Don Quixotes who brought this suit the moral victory (slight as it is) of being excused from paying the defendants' costs.

It does not matter in this case which approach we take to the question of deciding whether a statute that does not expressly create a private remedy for its violation is nevertheless enforceable by private persons. As Judge Nichols explains, the plaintiffs flunk the multi-factored test laid down in *Cort v. Ash*, 422 U.S. 66 (1975). Although *Cort* is still cited often enough, there is some doubt whether its test remains authoritative. See *California v. Sierra Club*, 451 U.S. 287, 302-03 (1981) (concurring opinion). The more recent cases suggest a simpler test, whether Congress intended the courts to create a private remedy. See, e.g., *Daily Income Fund, Inc. v. Fox*, 104 S. Ct. 831, 839 (1984). The plaintiffs flunk this test too. And even under the most liberal test (no longer in vogue)—that of *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916)—whereby if a violation of the statute "results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied," the plaintiffs could not win this case. They are not among the statute's intended beneficiaries.

I have said that the suit had no fair chance of suceeding. This is evident even if we consider the plaintiffs' pendent claims, whose dismissal by the district judge the plaintiffs have not appealed. Because the federal claim was dismissed on motion for summary judgment, it was not proper for the district judge even to reach the merits of

any of the pendent claims; he should have relinquished jurisdiction over them. When the federal claims in a case are dismissed before trial, the considerations of judicial economy that underlie the doctrine of pendent jurisdiction are diminished and are outweighed by the inroads that the doctrine makes into the autonomy of state courts in matters of state law. It is therefore the rule that, unless there are special circumstances, dismissal of the federal claim before trial requires the district judge to decline to exercise pendent jurisdiction over any state-law claims. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966); *Bernstein v. Lind-Waldock & Co.*, No. 83-2420, slip op. at 13 (7th Cir. June 18, 1984). There were no special circumstances here. Although the suit had been going on for a long time, and the district judge was concerned that the plaintiffs would have a statute of limitations problem if they started over in state court, they would not have. See Ill. Rev. Stat., ch. 110, ¶ 13-217. They district court also noted that the defendants would be entitled by 28 U.S.C. § 1442(a)(1) to remove a state court action brought against them. See *Willingham v. Morgan*, 395 U.S. 402 (1969). But the district court should not have made the decision to remove for the defendants by retaining the pendent claims.

Finally, personal sympathy is not a proper basis for withholding an award of costs under Rule 54(d). The district judge, reacting as a citizen, did not like the way in which a federal program was administered in this case, and so he punished the government by denying the defendants their costs. If I thought it relevant to my judicial duty I would attempt to evaluate the program in this light and in the end might agree with his assessment. But it is no business of mine as a judge whether government programs work well or badly, fairly or unfairly, provided they do not violate anyone's legal rights; and it seems to me clear beyond argument that nothing the defendants did or failed to do in this case violated any legal right of these plaintiffs that was within the district court's power to enforce.

FLAUM, *Circuit Judge*, concurring in result. I agree with my brethren that we should affirm the district court's rejection of the plaintiff's claims, and that the district court abused its discretion in denying the defendants their costs under rule 54(d).

As a line of recent Supreme Court cases makes clear, the ultimate issue in a case such as this is whether Congress intended to create a private right of action at the time it enacted the statute in question. *See, e.g., Daily Income Fund v. Fox*, 104 S. Ct. 831, 838 (1984); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377-78 (1982); *Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 15-16 (1979). Thus, "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra Club*, 451 U.S. 287, 294 (1981). Congressional intent may be discerned by examining a number of factors, including the statute's legislative history, the statute's purpose, the overall legislative scheme, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the states in affording the relief claimed. *See Daily Income Fund v. Fox*, 104 S. Ct. at 839; *Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. at 639.

The ultimate goal of our national housing policy, including that policy embodied in the National Housing Act, is "a decent home and suitable living environment for every American family. . . ." 12 U.S.C. § 1701t (1982); 42 U.S.C. § 1441 (1982). The plaintiffs have argued that an important part of this national housing policy is the maintenance and preservation of urban neighborhoods. While I do not question this proposition, *see* 42 U.S.C. § 1441a & b (1982), there is no legislative history or other evidence indicating that Congress intended to address the problem of neighborhood disintegration by conferring on neighbors of HUD-owned property the right to sue HUD for dam-

ages suffered as a result of the deterioration of that property. In fact, it is not clear that providing neighbors of HUD-owned property with such a right is even consistent with the ultimate goal of national housing policy, the provision of decent housing for all Americans. The plaintiffs argue that providing them with a damage remedy will serve the purpose of "deterring defendants' policy of neglect in the future." Appellants' Brief at 14. It may be, however, that the problems associated with HUD's property disposition program are of such complex origin that they do not lend themselves to a simple solution. I would not find an implied private right of action here on the basis of such a speculative deterrence theory. The plaintiffs also argue that the Housing Act gives them a right to a decent neighborhood, which entitles them to damages in this case. However, even assuming that the Housing Act did give them some rights as neighbors, these rights certainly are not as important in the legislative scheme as the rights of persons to whom HUD actually provides housing. This is significant because, as the court below observed, "[t]o grant neighborhood residents a damage remedy for injuries resulting from their proximity to hazardous housing would just divert funds from the provision of adequate housing." *Burroughs v. Hills*, 564 F. Supp. 1007, 1017 (N.D. Ill. 1983). Thus, there is no reason to find an implied private right of action for damages in this case.

Because the plaintiffs' claim for injunctive relief became moot in the court below, there is an argument that the issue of whether they would have had a private right of action for injunctive relief under the Housing Act is not before us. Neither party has made this argument, however. In fact, the defendants have argued that the plaintiffs have no private right of action at all, and the plaintiffs have argued that the district court erred because it found that the plaintiffs did have rights as neighbors under the Housing Act, but it failed to give them an effective means for vindicating those rights (a damage remedy) in this case. I agree with the parties that the

injunctive relief and damages issues are interwined, and, since the district court's opinion might be interpreted as suggesting that the plaintiffs would have had a cause of action for injunctive relief, I believe it is appropriate that we decide whether the Housing Act provides the plaintiffs with any private right of action to force HUD to maintain its property.

I can find no evidence that, in enacting the Housing Act, Congress intended to create a private right of action for injunctive relief for persons such as the plaintiffs in this case. There is no legislative history suggesting such an intention, and my view that neighbors of HUD-owned property are not the primary beneficiaries of the Housing Act further militates against our finding a private right of action in this case. In addition, this is a case in which we should consider "the traditional role of the states in affording the relief claimed." *Daily Income Fund v. Fox*, 104 S. Ct. at 839. Persons harmed unreasonably by conditions on neighboring property traditionally have been able to enjoin those conditions through suits based on state common law theories or state or local statutes. In this case, for example, the plaintiffs originally sought injunctive relief in part based on an Illinois statute, Ill. Rev. Stat. ch. 24, § 11-13-15, which provides that owners or tenants who are adversely affected by their neighbor's violation of certain municipal ordinances may sue to restrain, correct, or abate the violation. Even assuming it considered the matter at all, Congress undoubtedly would have been aware of the traditional role played by state and local law in providing injunctive relief for persons injured by conditions on their neighbor's property. This consideration lends further support to the conclusion that Congress did not intend that there be any private right of action for the plaintiffs in this case.[1]

[1] This position assumes that Congress did not intend that HUD be immune from such suits. In 12 U.S.C. § 1702 (1982), Congress provided that the Secretary of HUD may "sue and be sued" in her official capacity in connection with the carrying out of certain

(Footnote continued on following page)

Turning to the question of costs under rule 54(d), I find that the district court's refusal to award the defendants their costs was an abuse of discretion. In this circuit, there is a presumption that costs should be awarded to the prevailing party, and the losing party must overcome this presumption to avoid liability for costs. *Delta Air Lines, Inc. v. Colbert*, 692 F.2d 489, 490 (7th Cir. 1982). Historically, this court has found the presumption to be overcome only where there has been some fault, misconduct, default, or other action worthy of penalty on the

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[1] *continued*
provisions of the National Housing Act, including the provisions relevant to this case. This court has not decided whether the § 1702 waiver provision would apply where the Secretary of HUD is sued under state law to force her properly to maintain or repair property that HUD had acquired through mortgage foreclosure. Although there is no need to decide this question here, I note that there is significant authority suggesting that § 1702 was meant to permit such suits. In *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940), the Supreme Court interpreted § 1702 broadly. It stated that absent a clear showing that a particular type of suit is inconsistent with the statutory scheme or would gravely interfere with the performance of a governmental function, or that Congress plainly intended to use the "sue and be sued" clause in a narrow sense, "it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with the authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." 309 U.S. at 245. *See also Merrill Tenant Council v. HUD*, 638 F.2d 1086, 1090 (7th Cir. 1981) (HUD not immune from suit brought by tenants of HUD-owned or operated property to recover interest on security deposits owed them under state law); *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045, 1050-53 (D.C. Cir. 1971) (holding, under different federal housing laws than those involved here, that tenants of HUD-owned property may sue HUD for declaratory and injunctive relief under local and federal law regarding alleged failure properly to maintain property); *Estrada v. Hills*, 401 F. Supp. 429, 433 (N.D. Ill. 1975) (§ 1702 permits suit against HUD officials by neighbors of HUD-owned property alleging failure properly to maintain that property, though officials whose duties are discretionary are immune from liability for money damages).

part of the prevailing side. *Id.* Recently, this court held that a losing party also may overcome the presumption by a showing of indigency. *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983).

The plaintiffs have not argued, and the court below did not find, that the defendants deserve to be penalized for their conduct in this litigation. Although the district court did state that the plaintiffs are "of limited means," I do not interpret this as a finding of indigency. Thus, none of the previously recognized grounds for refusing costs to the prevailing party are present in this case. Moreover, there is no need to expand existing law in this area. While this case may have presented novel questions of public interest and importance, as the district court found, this is an insufficient reason to depart from the normal rule of awarding costs to the prevailing party. The District of Columbia Circuit has explained: "Unlike attorneys' fees, whose magnitude and unpredictability have discouraged parties with otherwise meritorious claims from litigation, the small and predictable costs of court fees, printing, and court reporters' fees have customarily been viewed as necessary and reasonable incidents of litigation, properly reimbursable to the winning party." *Baez v. United States Department of Justice*, 684 F.2d 999, 1003 (D.C. Cir. 1982). Thus, in the absence of a finding that the plaintiffs are indigent, there is no realistic concern that awarding costs to the defendants here will discourage persons from attempting to vindicate their rights in federal court. In short, there is no compelling reason in this case to alter the normal rule of awarding costs to the prevailing party.

Finally, with regard to the plaintiffs' state law claims, the denial of those claims by the district court was not appealed to this court. Thus, I find it not only unnecessary but also inappropriate for this court to decide whether those claims should have been entertained by the district court.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 22, 1984

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Philip Nichols, Jr., Senior Circuit Judge*/

Nos. 83 - 1604, 83-2289	)	
	)	
LEO BURROUGHS, JR., et al.,	)	
	)	Appeal
Plaintiffs-Appellants,	)	from the
Cross-Appellees,	)	United
	)	States
v.	)	District
	)	Court for
CARLA HILLS, SECRETARY,	)	the
DEPARTMENT OF HOUSING AND	)	Northern
URBAN DEVELOPMENT, et al.,	)	District
Defendants-Appellees,	)	of
Cross-Appellants.	)	Illinois,
	)	Eastern
	)	District
	)	
	)	No. 76 C 1640
	)	JAMES B.
	)	MORAN,
	)	Judge

*/ Honorable Philip Nichols, Jr. of the Uinted States Court of Appeals for the Federal Circuit, sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN NO. 83-1604 and REVERSED IN NO. 83-2289, in accordance with the opinion of this Court filed this date. Costs on appeal are awarded to defendants-appellees, cross-appellants.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 22, 1984

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL A. FLAUM, Circuit Judge
Hon. PHILIP NICHOLS, JR., Senior Judge*/

LEO BURROUGHS, JR., et al.,	)	Appeal
	)	from the
Plaintiffs-Appellants,	)	United
Cross-Appellees,	)	States
	)	District
Nos. 83-1604 vs.	)	Court for
83-2289	)	the
	)	Northern
CARLA HILLS, Secretary,	)	District
Department of Housing and	)	of
Urban Development, et al.	)	Illinois
	)	
Defendants-Appellees,	)	Eastern
Cross-Appellants.	)	Division.
	)	No. 76 C 1604
	)	James B.
	)	Moran,
	)	Judge.

ORDER

On September 7, 1984, plaintiff-appellants, cross-appellees, Leo

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*/ Hon. Philip Nichols, Jr., of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Burroughs, Jr. et al., filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEO BURROUGHS, JR., ESTHER ROBINSON, DONALD SCHATZ, EARL WHATLEY, STEVEN GOLDSMITH, ANTON SEALS, ISHMAEL SEYE, LIZZIE MAE BONNER, and the FIVE BLOCK CLUB,	)	
Plaintiffs,	)	
vs.	)	No. 76 C 1640
CARLA HILLS, Secretary, Department of Housing and Urban Development; JOHN WANER, individually and in his official capacity as Director of the Chicago area office of the Department of Housing and Urban Development; MARTIN ROGAN, individually and in his official capacity as Deputy Director of the Chicago area office of the Department of Housing and Urban Development; WILLIAM MILLER,	)	

individually and in his official capacity as Director of the Housing Management Division of the Chicago area office of the Department of Housing and Urban Development; JOHN DAVIS, individually and in his official capacity as Director of Property Division of the Chicago area office of the Department of Housing and Urban Development; STANLEY C. NYKIEL, individually and in his official capacity as realty specialist in the Housing Management Division of the Chicago area office of the Department of Housing and Urban Development; and SEWARD RIST,

Defendants.

MEMORANDUM AND ORDER

This action was instituted in 1976, charging various officials of the United States Department of Housing and

Urban Development ("HUD") with violations of state and federal law in connection with the maintenance of HUD-owned property in Chicago. It is now before the court on the parties' cross-motions for summary judgment upon a stipulation of facts.

STIPULATION OF FACTS

The building that is the subject of this lawsuit is a three-story residence located at 7228 South Coles Avenue in Chicago. HUD acquired title to the property in November 1974, after entry of a decree of foreclosure on the owner's mortgage. During the period of HUD's ownership the building was uninhabited, boarded up, and in a state of disrepair. The building had structural problems, including a cracked foundation, dilapidated porch and steps,

unstable floors, and broken windows. It was infested with rodents and debris was scattered around the building. There was neither a night watchman on the premises nor a fence around the building, as required by sections 39-13 and 99-4.1 of the Municipal Code for the City of Chicago ("municipal code"). During the period of its ownership HUD expended $285.00 in repairs on the building. In addition, pursuant to an Area Management Broker Contract, it paid defendant Seward Rist ("Rist") $17.50 per month to oversee the building.

HUD's disposition policy with respect to one- to four-unit buildings at the time it acquired the building in question was to maximize sales on a "cash only, as-is, without warranty" basis. When, in August 1975, the late

Mayor Richard J. Daley objected to this policy, HUD agreed to place a moratorium on such sales of HUD-owned Chicago property pending development of a "Chicago Plan". Under the subsequently developed Chicago Plan, a purchaser of certain HUD-owned properties paid, in addition to the purchase price, $2,000.00 to be placed in an escrow fund and to be refunded to the purchaser upon certification by a City inspector that there were no major violations of the municipal code. The building in question was ultimately classified as eligible for disposition by this method.

HUD had a second property disposition program which operated in conjunction with the Chicago Plan. Under the Property Release Option Program ("PROP"), HUD would sell a

qualifying building for $1.00 to the City and the City in turn would convey it to a not-for-profit organization for rehabilitation.

Shortly after HUD's acquisition of the property in question, Rist reported that it had a fair market value of $40,000.00. HUD then commissioned a repair specification study which indicated that, in March 1975, $17,389.00 in repairs would be necessary to bring the building into compliance with the municipal code. A study commissioned by the South Shore Senior Citizens Center in April 1976 indicated that it would cost $41,581.25 to rehabilitate the building. In May of 1976, Charles J. Shepard, of the City of Chicago Department of Urban Renewal, inspected the building and determined that it would cost $40,718.40

to bring the building into compliance with the occupancy requirements of the municipal code.

In March 1975 plaintiff Leo Burroughs wrote on behalf of plaintiff Five Block Club, an organization composed of individuals concerned with securing a safe, comfortable and healthy community environment and with advancing the community's interests, to defendant John Waner, Director of the Chicago Area Office of HUD, expressing concern over the deterioration of HUD-owned properties in the area. In April, seven members of the Five Block Club met with Waner and another HUD official to present them with a petition signed by 107 of the members of the Club and by defendant Rist, which requested immediate sale of the Coles property to a buyer who would

rehabilitate the building. After this meeting HUD expended $40.00 to re-secure four windows in the building.

Shortly after the meeting Rist informed the Five Block Club, by letter, that the building was for sale and requested that members immediately report problems with the building to Rist or to the police. Copies of this letter were sent to Waner and defendant Stan Nykiel, a realty specialist in the Property Disposition Branch of the Housing Management Division of HUD's Chicago Area Office. Subsequently, several members communicated concern about the building to Rist. In June of 1975 defendant John Davis, Director of Property Disposition for HUD's Chicago Area Office, wrote to members of the Five Block Club expressing appreciation for their concern about the building.

In April of 1976 the City of Chicago requested that HUD keep the building off the real estate market for possible purchase by the City under PROP. Sometime in July, 1976, pursuant to PROP guidelines, HUD sold the building to the City for $1.00 and the City reconveyed it to the South Shore Senior Citizens Center for rehabilitation.

THE LITIGATION

Before HUD disposed of the building, the Five Block Club and eight of its members (Leo Burroughs, Jr., Esther Robinson, Donald Schatz, Earl Whatley, Steven Goldsmith, Anton Seals, Ishmael Seye, and Lizzie Mae Bonner) filed suit against defendants Rist, Waner, Nykiel, and Davis, as well as Carla Hills, then Secretary of HUD, Martin Rogan, Deputy Director of HUD's

Chicago Area Office, and William Miller, Director of the Housing Management Division of HUD's Chicago Area Office. The complaint charged that these defendants had violated their duties under the National Housing Act ("NHA"), 12 U.S.C. §1701 et seq., and HUD regulations to maintain and repair HUD-owned properties. It also charged them with violations of Illinois statutes and Chicago's municipal code. The original complaint sought an injunction against these continuing violations of federal, state, and local law. Plaintiffs also requested money damages for the hazards to their health, safety, and welfare allegedly resulting from the improper maintenance of the building.

After HUD sold the building plaintiffs amended their complaint,

deleting the request for injunctive relief. Defendants subsequently filed a motion to dismiss for failure to state a claim, and both plaintiffs and defendants moved for summary judgment. Judge Leighton denied all motions, concluding that plaintiffs had stated a claim under the NHA and HUD regulations, and that the existence of material factual issues as to the condition of the building precluded summary judgment. He did not reach the question whether federally-owned property is subject to state and local housing laws. Burroughs, et al. v. Hills, et al., No. 76 C 1640 (N.D. Ill. October 11, 1978).[1/]

THE MOTIONS FOR SUMMARY JUDGMENT

A. Introduction

The stipulation of facts submitted by the parties makes it abundantly

clear that HUD owned a building in Chicago, as a result of foreclosure, for a 19-month period beginning in 1974 and continuing into 1976; that it contracted routine maintenance of the building to defendant Rist; and that the building, due to neglect and vandalism, substantially deteriorated during the period of HUD ownership. The building was then sold to a non-profit organization for rehabilitation. The parties have stipulated that the total damages recoverable, assuming liability, is $1,000.00 against the HUD defendants and $350.00 against Rist. This suit has survived the conveyance and subsequent rehabilitation of the property primarily as a vehicle to determine whether neighbors of blighted HUD-owned property have a cause of action for damages as a means

of compelling HUD and its agents to act. Stripped to barest essentials, defendants' contentions are that federal law imposes no duties upon them enforceable at the behest of these plaintiffs and that they are not answerable under state and local law.

B. The Federal Claims

The initial question presented by the cross-motions for summary judgment is whether plaintiffs have a right of action for damages under the applicable provisions of the NHA and the HUD regulations[2/] developed thereunder. The parties[3/] agree that there is no express provision for such an action by neighbors of HUD-owned property for failure to maintain that property and that the statute contains no other express enforcement mechanism. Plaintiffs must

therefore rely on the theory of an implied private right of action in order to state a claim.

The court notes at the outset that both sides have engaged in a wide-ranging analysis of the legal principles governing private rights of action, standing, and even subject matter jurisdiction. Defendants have argued that plaintiffs do not satisfy the criteria for implication of a private right of action established in Cort v. Ash, 422 U.S. 66, 78 (1978), do not even meet the standing requirements of Warth v. Seldin, 422 U.S. 490 (1975), Data Processing Services v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970), and do not fall within the limited waiver of sovereign immunity provided in the NHA, 12 U.S.C.

§1702. Plaintiffs, on the other hand, argue that the NHA and HUD regulations, which are couched in mandatory language, as well as the United States Housing Act, 42 U.S.C. §1441 et seq., impose enforceable duties on the HUD defendants and therefore require implication of a private right of action in their favor.

The passage of time has reduced this lawsuit to one for damages only. The issue at this stage of the proceedings is thus a much narrower one than the parties advocate: does the NHA create a cause of action in favor of neighbors of HUD-owned buildings to recover damages for the failure of HUD personnel to maintain such property?

Although the Supreme Court has said that "the question whether a litigant has a 'cause of action' [under a

statute] is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive," Davis v. Passman, 442 U.S. 228, 239 (1978), most decisions have treated the two questions as interrelated and have not articulated the different considerations that might apply in deciding the availability of equitable as opposed to monetary relief under a given statute. Examination of the two "separate" questions has, for the most part, merged under a general analysis of the criteria for implying a private cause of action established in Cort v. Ash, supra: (1) whether plaintiff is a member of the class for whose special benefit the statute was enacted;[4/] (2) whether the history or language of the statute suggests an intent to create

a private cause of action; (3) whether implication of a cause of action is consistent with the purposes and scheme of the statute; and (4) whether the cause of action is one traditionally relegated to state law.

The case law on implied private rights of action does, however, suggest that courts discriminate between the question of existence of a cause of action and existence of a particular remedy in two respects. First, the focus where damage actions are concerned tends to be on the third Cort factor. Second, there appears to be generally greater hesitancy to imply a cause of action for damages than one for equitable relief.

The Court of Appeals for the Seventh Circuit recently drew an explicit

distinction between the questions of available remedies and the existence of a cause of action. In Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981), cert. denied, _____ U.S. _____, 102 S. Ct. 1993 (1982), the court examined the availability of a damage remedy for persons subjected to sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a). Although the Supreme Court in Cannon v. University of Chicago, 441 U.S. 677 (1979), had previously implied a private right of action under Title IX, the Seventh Circuit did not consider that decision controlling on the question of available relief. Instead, relying on the above-quoted language in Davis v. Passman, supra, it concluded that the question of remedies must be considered separate and apart

from the issue of a private cause of action. Focusing on the purpose of the statute in question, it concluded that a damage remedy was not consistent with its purposes and would not further its goals.[5/]

Other courts have been reluctant to extend an implied private right of action to include monetary relief. In Ruth Anne M. v. Alvin Independent School Dist., 532 F.Supp. 460 (S.D. Tex. 1982), the court considered the existence of an implied private right of action for damages under the Rehabilitation Act of 1973, 29 U.S.C. §794. Based on the legislative history of the Act and the fact that it creates substantive rights in favor of the handicapped, the court concluded that such persons have a private right of action to enforce

the Act. However, after considering the statute, its legislative history, and the statutory objectives, the court found that "Congress, although intending a judicial remedy to enforce rights conferred by [the Act], intended generally to provide for enforcement of those rights only through injunctive and declaratory relief." 532 F.Supp. at 471. It rested its decision in part on the adequacy of equitable relief to protect the rights of the handicapped and the fact that a damage remedy, in potentially imposing massive financial liability upon recipients of federal funds, might deter acceptance of such funds and thus impede the legislative goal of expanding opportunities for the handicapped. In reaching this conclusion, the court expressly rejected the

approach taken in Bell v. Hood, 327 U.S. 678 (1946), that where a statute creates substantive rights courts should presume the full panoply of traditional remedies. It said, "[t]hat principle seems unavoidably suspect in view of recent Supreme Court decisions considering the implication of private remedies and the element of congressional intent." Id. (citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) and Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

In Boxall v. Sequoia U. High Sch. Dist., 464 F.Supp. 1104 (N.D. Cal. 1979), the court, although finding an implied private right of action to enforce the provisions of the Rehabilitation Act, also declined to give beneficiaries of the Act a damage remedy. It

concluded that such actions should be limited to equitable relief, finding that, because the statute did not purport "to give individuals a whole panoply of new rights and remedies," it "should probably be seen as creating a private supplement to governmental enforcement, not as providing a new entitlement to damages." Id. at 1112.

In Loughran v. Flanders, 470 S.Supp. 110 (D. Conn. 1979), the court, though it did not explicitly distinguish between the remedy and cause of action issues, counseled special hesitation in implying a damage remedy, focusing on the purpose of the statute at issue. Although the plaintiff in Loughran was a special beneficiary of the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq.,

and indeed, had an express private right of action under the statute, the court declined to imply a damages remedy because the statutory purposes of providing federal assistance for education of the handicapped and serving as a catalyst for educational innovation would not be furthered by such a remedy. Id. at 115.[6/]

Keeping in mind the generally greater hesitancy of the courts, and particularly the Court of Appeals for the Seventh Circuit to imply a damage remedy in a statute that does not expressly provide for one, the court turns now to the statute in question.

In insuring and eventually acquiring the property in question, HUD was acting pursuant to the NHA, more specifically, the mortgage insurance provisions of the NHA, 12 U.S.C. §1707

et seq. The policies and goals of the subchapter on mortgage insurance as well as other federal housing legislation are enunciated in 42 U.S.C. §§1441 and 1441a and reaffirmed in 12 U.S.C. §1701t. Section 1441 states:

> The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and other blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family ....

Section 1441a states in relevant part:

> (b) The Congress further finds that policies designed to contribute to the achievement of the

national housing goal have not directed sufficient attention and resources to the preservation of existing housing and neighborhoods, that the deterioration and abandonment of housing for the Nation's lower income families has accelerated over the last decade, and that this acceleration has contributed to neighborhood disintegration and has partially negated the progress toward achieving the national housing goal which has been made primarily through new housing construction.

(c) The Congress declares that if the national housing goal is to be achieved, a greater effort must be made to encourage the preservation of existing housing and neighborhoods through such measures as housing preservation, moderate rehabilitation, and improvements in housing management and maintenance, in conjunction with the provision of adequate municipal services. Such an effort should concentrate, to a

> greater extent than it has in the past, on housing and neighborhoods where deterioration is evident but has not yet become acute (emphasis supplied).

Section 1701t reiterates the goal of "a decent home and a suitable living environment for every American family" and further states:

> The Congress declares that in the administration of those housing programs authorized by this Act which are designed to assist families with incomes so low that they could not otherwise decently house themselves, and of other Government programs designed to assist in the provision of housing for such families, the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality ....

The above-quoted statement of purposes makes it clear that Congress,

in passing the NHA, intended primarily to benefit low income persons in need of adequate housing. However, they are not the sole beneficiaries of the statute. Federal housing legislation also evidences a concern for the development and maintenance of "stable, desirable urban communities." Alschuler v. Dept. of Housing & Urban Development, 686 F.2d 472, 278 (7th Cir. 1981).

The goal of aiding in the preservation of existing housing and urban communities and the resulting benefit to residents of neighborhoods where the federal government invests its funds are even more apparent in the particular statutory provisions and administrative guidelines under which HUD acquired and handled the property in question. HUD acquired the building

pursuant to 12 U.S.C. §1710, which provides for conveyance to HUD upon foreclosure, of mortgaged properties which are federally insured under 12 U.S.C. §1709. Section 1710(g) grants the Secretary of HUD the power to "deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in his discretion, any properties conveyed to him...."

HUD promulgated guidelines for the maintenance and disposition of properties acquired through mortgage foreclosure.[7/] Those guidelines indicate that the NHA was intended at least in part to ensure the preservation of existing housing and the protection of residents of neighborhoods receiving federal housing monies. Paragraph 23 of the Handbook requires that all properties "shall be fully repaired promptly"

(emphasis supplied), and notes that "[t]he timely provision of repair or substantial rehabilitation may be critical to the preservation of block [sic] and even neighborhoods in older areas of our cities and suburbs." Paragraph 23g imposes on HUD the duty to give immediate attention "to those repairs required to prevent undue deterioration and eliminate hazardous conditions that may be dangerous to the public." Paragraph 70 of the Handbook states that "[e]very possible precaution shall be taken to eliminate conditions which may contribute to injury or damage to the person or property of others, particularly those conditions which may be attributed to negligence." Paragraph 104 reiterates this concern, stating, "Immediate action must be taken to eliminate any conditions hazardous to the public...."

The court concludes that the statement of purposes in the NHA and the above-quoted language in the HUD regulations place plaintiffs within those classes of persons which the NHA seeks to benefit. The court further concludes that the NHA and the HUD Handbook impose upon HUD the duty to maintain properties it acquires through foreclosure.

First, this circuit has read the NHA as imposing a duty upon HUD to act consistently with national housing policies. United States v. Winthrop Towers, 628 F.2d 1028, 1034-35 (7th Cir. 1980). (HUD decision to foreclose mortgage subject to review under the Administrative Procedure Act for conformity to national housing objectives). See Also Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848, 855 (D.C. Cir. 1974). One

of those policies or goals is the preservation of existing housing and neighborhoods. Second, HUD's own internal guidelines make mandatory HUD's maintenance and repair of buildings it acquires through mortgage foreclosure. The HUD defendants' argument that the Handbook is not binding on them because it was not published in accordance with statutory rule-making procedures is not well taken. Brown v. Lynn, 392 F. Supp. 559 (N.D. Ill. 1975), on which they rely, involve an attempt to impose upon third parties the duties set forth in an unpublished HUD handbook. Here, plaintiffs seek to hold HUD itself to the standards it has established. See Estrada v. Hills, 401 F. Supp. 429, 437-38 (N.D. Ill. 1975).

The question in this case, however, is not whether plaintiffs have

standing to bring an action for judicial review of HUD's conduct under the Administrative Procedure Act, 5 U.S.C. §701 et seq., or even whether they can enforce HUD's duties by obtaining an injunction against the responsible officials directly under the NHA. Rather, the issue here is whether the foregoing evidence of congressional intent to confer a benefit upon the class of individuals to which plaintiffs belong and the mandatory nature of HUD's duties support implication of a private right of action for damages by these plaintiffs. The court concludes that they do not for essentially two reasons.

First, plaintiffs are not the sole or even primary beneficiaries of the NHA in general or the specific statutory provisions at issue here.

There can be no questions, and plaintiffs do not dispute, that potential inhabitants of federally-funded or supported housing are the primary beneficiaries of federal housing legislation. In addition, there are other classes of potential plaintiffs who share secondarily in the benefits of the statutes in question. For example, the NHA contains numerous incentives for the involvement of private developers in housing construction, and Congress has expressed an interest in such participation as one of the goals of the housing statutes. 42 U.S.C. §1441. See Shivers v. Landrieu, 674 F.2d 906, 911 (D.C. Cir. 1981) (tenants of federally-insured housing have no private right of action for damages under mortgage insurance provisions of the NHA for deficient building maintenance because "[t]hey are

not, however, the Act's only beneficiaries -- obviously the benefit of mortgage insurance operates directly in favor of the bankers, builders, and developers.")

The government itself is an intended beneficiary of various provisions of the NHA. For example, HUD's authority to set rents on federally-insured buildings under §221(d)(3) of the NHA, 12 U.S.C. §1715L(d)(3), while clearly aiding low income tenants, also "attempts to assure adequate return sufficient to prevent foreclosure," thereby benefitting the government, which "will bear the brunt should there be a default." Falzarano v. United States, 607 F.2d 506, 510 (1st Cir. 1979) (tenants of federally-insured housing have no private right of action for violations of §221(d)(3)). And HUD's

duty under §221(d)(2), 12 U.S.C. §1715L(d)(2), to insure mortgages only on property that conforms to local ordinances redounds to the benefit of the government because it "assure[s] the United States of adequate security for the mortgages FHA insure[s]." Davis v. Romney, 490 F.2d 1360, 1372 (3d Cir. 1974) (purchasers of homes with federally-insured mortgages may maintain an action under the Administrative Procedure Act for declaratory and injunctive relief but have no private right of action for damages when HUD violates §221(d)(2)).

In the present case, HUD's authority, under §204(g) of the NHA, 12 U.S.C. §1710(g), to deal with property acquired through foreclosure protects the government's financial interests as well as the interests of

potential purchasers. The Forward to the HUD Handbook notes that it is "designed to assist in the disposal of properties as promptly as possible. The prompt and orderly disposition of properties is absolutely essential to the continuous cash flow to the treasury resulting from sales proceeds." Paragraph 23e of the Handbook states that the policy of complete and adequate repair "protects HUD and it also protects the purchasers." In the chapter titled "Repairs and Maintenance," the Handbook provides at ¶185,

> a. [The overall objective] is to (a) place properties in first class condition to create maximum sales appeal at the highest obtainable sales price in order to contribute to maintenance of a firm real estate market; (b) eliminate potential default hazard attributable to physical

> deficiencies and (c) eliminate all structural, (including termite infestation) mechanical and surface deficiencies which, if not eliminated, would result in major repair or replacement expenditures by the purchaser, or demand upon HUD under the terms of the warranty on the Sales Contract, Form 2384.

Thus, any maintenance and repair responsibilities imposed upon HUD by the NHA and the HUD Handbook benefit not only neighbors of HUD-owned properties, but also purchasers of such properties and the government itself. The fact that damages, if available, would ultimately come from the pocket of a beneficiary of the very statute and regulations under which plaintiffs sue militates against implying a damage remedy.

The second and more significant reason for declining to infer from

the NHA a damage remedy on behalf of plaintiffs is that such relief would be at cross purposes with the fundamental objectives of the statute and other housing legislation. "The primary purpose of the legislative scheme is to upgrade the nation's housing." Cedar-Riverside Assoc. v. City of Minneapolis, 606 F.2d 254, 258 (8th Cir. 1979). This is to be accomplished through a variety of mechanisms, including rental subsidies for new or rehabilitated housing, mortgage insurance, and federal funding for urban redevelopment. To grant neighborhood residents a damage remedy for injuries resulting from their proximity to hazardous conditions on HUD-owned property would just divert funds from the provision of adequate housing. The payment of money to nearby residents

does not paint a porch or glaze a window; it does not in any respect preserve a neighborhood. At most it provides some balm to some undefined and virtually undefinable class of people for continuing co-existence with substandard housing. Furthermore, an award of compensation for plaintiffs' alleged injuries, as opposed to enforcement through injunctive relief or judicial review under the Administrative Procedure Act, would not even necessarily deter future derelictions of duty by HUD officials. See Jones v. Reagan, No. 81-2918, slip op. at 4-5 (7th Cir., January 4, 1983) (discussing "make whole" and deterrent functions of compensatory and punitive damage awards). Under these circumstances, implication of a private right of action for damages under the

NHA is ill-advised. See Shivers v. Landrieu, 674 F.2d at 912 (granting tenants of federally-insured housing a damages remedy might "impede," rather than promote the construction of housing units (emphasis in original)).

Upon reviewing the statute in question, the court concludes that while plaintiffs are within one of several classes of potential litigants protected and benefitted by the NHA and thus may enforce the duties imposed by the statute, a damages remedy is not contemplated by or consistent with the purposes of the NHA. Summary judgment must therefore be granted in defendants' favor with respect to the federal claims.[8/]

C. The State Law Claims

Normally a party's state law claims, brought pursuant to the court's

pendent jurisdiction, should be dismissed if his federal claims are rejected prior to trial. United Mineworkers of America v. Gibbs, 383 U.S. 715, 726, (1966); Abiodun v. Martin Oil Service, Inc., 475 F.2d 142, 145, (7th Cir.), cert. denied, 414 U.S. 866 (1973). However, under certain circumstances "judicial economy, convenience, and fairness to the litigants' favor the retention of jurisdiction over state law issues...." Forest Laboratories, Inc. v. Pillsbury Company, 452 F.2d 621, 629, (7th Cir. 1971) (quoting United Mineworkers, supra). Upon weighing these factors the court concludes that plaintiffs' state claims should be resolved here.

First, the parties have filed cross-motions for summary judgment. The

case is therefore in the same procedural posture as one in which the parties have gone to trial; discovery is complete and all the evidence has been presented. Second, this case has been pending in federal court since 1976; if the state claims were dismissed for lack of jurisdiction and plaintiffs forced to re-file their suit in state court, they might well be confronted with statute of limitations problems. Third, assuming plaintiffs were able to bring an action in state court, the federal defendants would be entitled to remove the action to federal court pursuant to 28 U.S.C. §1442(a)(1), and in all likelihood would do so. For these reasons the court will, in its discretion, exercise jurisdiction over plaintiffs' state law claims.

In Counts II and III of their complaint, plaintiffs have alleged that defendants violated state and municipal law in failing to have a night watchman on the premises, in maintaining the building in a manner constituting a nuisance, in failing to erect an eight-foot fence around the building, and in permitting the building to be boarded up. Defendants concede these facts, but argue, nonetheless, that they are not liable for these violations of local law. The HUD defendants contend that they are free from state regulation under the supremacy clause of the United States Constitution, that they are absolutely immune from liability for what are in essence common law torts, and, alternatively, that they are entitled to a good faith defense under the

stipulated facts. Defendant Rist contends that, because state law permits only injunctive relief for violations of municipal ordinances, plaintiffs have no cause of action for damages.

The court rejects the general proposition that the supremacy clause completely relieves federal officials of susceptibility to suit for violations of state law. Rather, when an agency of the federal government insinuates itself into the local business world, as HUD does here under the mortgage insurance and foreclosure provisions of the NHA, it should, as a general rule, be held to the same legal obligations as a private property owner. Cf. F.H.A. v. Burr, 309 U.S. 242, 245 (1940) (construing NHA waiver of sovereign immunity provisions and holding that "when Congress launched

a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be...."); City of Philadelphia v. Page, 363 F. Supp. 148, 153 (E.D. Pa. 1973) (holding HUD liable over to purchaser of HUD property which violated local ordinances: "When the government goes into the marketplace it must go as everyone else" (citation omitted)). This court agrees with the view taken in City-Wide Coalition, Etc. v. Philadelphia Hous. Auth., 356 F. Supp. 123, 129 (E.D. Pa. 1973), where the court held that Congress had not granted HUD the right to preempt or disregard reasonable local health regulations concerning properties which it

acquires. See also Knox Hill Tenant Council v. Washington, 448 F.2d 1045, 1055 (D.C. Cir. 1971) (no evidence of congressional intent to exempt government-owned housing from local housing codes).[9/]

The court's view that HUD's owned property is subject to local housing codes is buttressed by HUD's own regulations with regard to the property in question. The HUD Handbook states at ¶185(d), "[I]n areas where local housing codes are in effect and are being actively enforced, the repair program is to be designed to meet local code requirements." Thus, neither the NHA nor HUD's own guidelines support the HUD defendants' preemption argument. Cf. City of Boston v. Harris, 619 F.2d 87, 95 n.21 (1st Cir. 1980) (administrative preemption of local law in absence of explicit

congressional declaration of preemption valid where Congress delegates to agency broad administrative powers).

The court recognizes that even where there is no express preemption provision in a federal statute, federal preemption may be warranted when there is a clear conflict between federal and local law. See Chicago-Midwest Meat Ass'n v. City of Evanston, 589 F.2d 278, 282 (7th Cir. 1978), cert. denied, 442 U.S. 946 (1979), and cases cited therein. However, the state and local law in question here does not conflict with the purposes of the NHA. As discussed above, the NHA, along with other federal housing legislation, was enacted to aid in the provision of safe and decent housing to the nation's lower income families through the construction

of new housing and the rehabilitation of existing structures. Municipal code provisions which require a night watchman on the premises of vacant buildings to protect against vandalism and which prohibit operation of a building as a nuisance compliment rather than hinder these federal goals.[10/] Similarly, the Illinois statutory provision which permits a municipality to demolish or repair "dangerous and unsafe buildings or uncompleted and abandoned buildings," Ill. Rev. Stat., ch. 24, §11031-1 (1979), has a purpose which parallels the goals of federal housing legislation. It was intended to provide municipalities with "an effective tool for protecting its citizens from the unfortunate and degrading results of substandard and

dangerous housing." City of Chicago v. Nielsen, 38 Ill. App. 3d 941, 349 N.E.2d 532, 537 (1st Dist. 1976).

Defendants argue that requiring compliance with these ordinances would be exceedingly burdensome financially and would frustrate national housing goals because it would, in effect, encourage demolition of buildings acquired by HUD through mortgage foreclosure. Such an argument is unpersuasive. It is highly unlikely that HUD would choose to incur the expense of demolishing its buildings and, in addition, lose the value of such buildings as a result of demolition in order to avoid complying with local law. Moreover, this argument could be used to avoid liability under any state or local law that requires some expenditure of

federal monies. The court does not believe that the "clear conflict" doctrine of the supremacy clause was intended to reach so far.

The federal defendants' remaining arguments that they have absolute immunity or at least a good faith defense with respect to the state law claims involve complicated factual questions concerning the scope of their official functions and their specific duties as HUD employees, and are in the nature of affirmative defenses. In light of the court's determination that, under Illinois law, plaintiffs have not stated a claim entitling them to monetary relief against the federal or private defendants, these questions need not be decided.

Plaintiffs brought their state law claims pursuant to Ill. Rev. Stat.

ch. 24, §11-13-15, which provided in relevant part:

> any owner or tenant of real property within 500 feet in any direction of the property on which the building or structure in question is located who shows that his property or person will be substantially affected by the alleged violation [of ordinances enacted pursuant to certain divisions of the Illinois Municipal Code], in addition to other remedies, may institute any appropriate action or proceeding ... (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct or abate the violation.11/

The statute by its terms creates a limited right of action on behalf of certain private parties to enforce municipal ordinances by way of an injunction.12/ Contrary to plaintiffs' contention, the statutory language

referring to other available remedies does not create statutory remedies in addition to injunctive relief. Rather, it simply makes clear that the §11-13-15 does not preclude other remedies or rights of action available under other statutues or the common law.[13/] Plaintiffs' suit for injunctive relief has been mooted by the sale of the building and §11-13-15 provides no other remedy to private parties in connection with violations of city ordinances. Plaintiffs, obviously because of the restrictions upon private actions challenging public nuisances, in their briefs expressly disavow that their state law claims for damages are in the nature of a common law nuisance action, stating, "No part of plaintiffs' complaint even purports to allege the elements of such

a tort." (Plaintiffs' Reply Memorandum, p. 14). Accordingly, defendants' motion for summary judgment respecting the state law claims must also be granted.

JAMES B. MORAN
Judge, United States
District Court

FOOTNOTES

1/ This court rejects plaintiffs' contention that Judge Leighton's earlier ruling that the complaint states a claim represents the law of the case, and the question of a private right of action thus may not be relitigated. In the first place, Judge Leighton did not expressly rule that plaintiffs had a private right of action. Secondly, even if he had, the district court is always free to reconsider prior rulings if it is convinced that its law of the case is substantially erroneous. Diaz v. Indian Head, Inc., 686 F.2d 558 (7th Cir. 1982).

2/ The parties disagree as to the correct characterization of HUD's Property Disposition Handbook for One to Four Family Properties, No. 4310.5 (the "Handbook"). Plaintiffs characterize it as containing binding regulations placing mandatory duties on HUD personnel. Defendants, on the other hand, describe it as setting out internal policies and guidelines rather than enforceable duties. For the sake of convenience, the court will occasionally refer to the Handbook and its contents as the "HUD regulations".

3/ The motion of defendant Rist, the area management broker, has a somewhat different focus. Rist

argues that summary judgment must be granted in his favor because his duties are defined solely by his contract with HUD, not by federal law of HUD regulations, and any liability on his part runs only to the other contracting party, i.e., HUD.

4/ The Court elaborated on this first factor saying that the question is whether "the statute create[s] a federal right in favor of the plaintiff." 422 U.S. at 78. In Universities Research Assn. v. Coutu, 450 U.S. 754, 772 (1981), the Court analyzed this factor in terms of whether the language of the statute in question has "'an unmistakable focus on the benefitted

class' ... [on is] framed ... simply as a general prohibition or a command to a federal agency." (quoting Cannon v. University of Chicago, 441 U.S. 677, 690-91). At least one court has viewed the language of the [Coutu] decision as a "refinement" of the first [Cort] factor. Miener v. State of Mo., 673 F.2d 969, 974, n.4 (8th Cir.), cert. denied, 103 S.Ct. 215, 230 (1982).

5/ In Guardians Ass'n of New York City v. Civil Serv., 633 F.2d 232 (2d Cir. 1980), cert. granted, 454 U.S. 1140 (1982), a majority of the court reached a different result concerning the availability of damages under Title VI of the Civil Rights Act of 1964, 42 U.S.C.

§2000d, the statute after which Title IX was modeled. The court felt that Cannon, which it characterized as implying a "private right of action unlimited as to remedy," 633 F.2d at 273, compelled this result. Judge Meskill, who disagreed with the majority view, examined the question of a damage remedy in light of the four cort factors and concluded, primarily in light of the purposes of Title VI, that such a remedy was not available. Id. at 255.

6/ In Anderson v. Thompson, 658 F.2d 1205, 1210 n.7 (7th Cir. 1981), the court concluded that the Cort v. Ash four-step analysis was inappropriate when the question is availability of remedies rather than existence

of a cause of action, especially where the statute involved expressly provides for a right of action but is silent as to relief. It nonetheless examined the availability of a damages remedy under the statute in question there in light of the statute's language, legislative history and purposes. These are the first three factors outlined in Cort.

7/ As noted [supra] at fn. 2, the parties disagree as to the enforceability of the duties set forth in the Handbook. The HUD defendants, citing Brown v. Lynn, 392 F. Supp. 559 (N.D. Ill. 1975), argue that the "guidelines" contained therein do not constitute binding regulations because there

was no compliance with the requirements of the Administrative Procedure Act, 5 U.S.C. §553(b). Plaintiffs, relying on Estrada v. Hills, 401 F. Supp. 429 (N.D. Ill. 1975), contend that the Handbook imposes mandatory duties on HUD officials. At this point the court examines the contents of the Handbook solely for the purpose of gleaning evidence of legislative intent to benefit a particular class of potential litigants. While statements of policy contained in agency regulations or guidelines would alone be insufficient to infer a private cause of action, they are relevant to the extent that they support congressional intent as

expressed in the language or history of the statute.

8/ Although Rist, the only non-government defendant in this case, does not challenge plaintiffs' federal claims on implied private right-of-action grounds, the foregoing analysis applies as well with respect to the federal claims against him.

9/ The only case in this circuit dealing with HUD's liability under local law is Merrill Tenant Council v. U.S. Dept. of Housing, 638 F.2d 1086 (7th Cir. 1981), where the court held that HUD was obligated to pay interest on security deposits received from tenants of HUD-owned or operated property, as required

by Illinois law. Id. at 1089. The Merrill court did not expressly decide the preemption question, rather simply assuming that Illinois law applied to the federal defendants.

10/ The purpose of §99-4.1 of the municipal code, which requires that property used "for the purpose of storing used lumber, metal, or other second-hand building material" be surrounded by an eight-foot fence and its applicability to the building in question is less clear. Most likely, it was intended to protect the public from the dangers attendant upon the storage of such materials. However, in light of the resolution of plaintiffs' state law claims, the court need not

determine the purpose of this ordinance. The court also wonders, in passing, whether strict enforcement of the night watchman ordinance against HUD might give it some species of equal protection or selective prosecution argument. On the other hand, strict enforcement of the ordinance generally would go far toward fulfillment, in Chicago at least, of the dictates of the Humphrey-Hawkins Act.

11/ The statute was amended in 1977 to permit tenants or owners within 1200 feet to bring suit.

12/ Section 11-13-15 provides for enforcement of municipal ordinances. Count III of plaintiffs' complaint alleges a violation of a

state statute not a municipal ordinance. Moreover, the statute in question, Ill. Rev. Stat. ch. 24, §11-31-1 (1981) grants to the corporate authorities of each municipality the right to demolish or repair certain buildings. Although the parties do not argue the point, it does not appear that §11-13-15 grants plaintiffs the right to enforce state statutes.

13/ This view is supported by the fact that the statute specifically refers only to the court's power to issue restraining orders and preliminary and permanent injunctions, and mentions no other remedies.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEO BURROUGHS, JR., et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	76 C 1640
	)	
CARLA HILLS, etc., et al.,	)	
	)	
Defendants.	)	

ORDER

While the designation of "landmark case" would overstate the scope of this lawsuit, this case did present novel questions of considerable public interest and importance, was brought by plaintiffs of limited means to seek answers to those questions rather than for commercial advantage or private gain, and was litigated in that context. This court considers such a case to be

within the narrow discretion allowable under Delta Air Lines, Inc. v. Colbert, 692 F.2d 489 (7th Cir. 1982), and its exercises that discretion to deny costs.

ENTER:

s/James B. Moran
United States District Judge

Date: May 10, 1983

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEO BURROUGHS, JR. et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	76 C 1640
	)	Before the
CARLA HILLS, etc., et al.	)	Honorable
	)	George N.
Defendants.	)	Leighton
	)	United States
	)	District Judge

Memorandum Order

Eight Chicago residents and a civic organization have joined in this suit against the United States Department of Housing and Urban Development, (HUD), and several named defendants for injuries they allegedly sustained as a result of what they say is defendants' misfeasant maintenance of a vacant and abandoned building located at 7228 South Coles Avenue, Chicago, Illinois. Plaintiffs

assert that defendants' poor maintenance of the building violated express regulations promulgated by HUD; was a violation of an affirmative duty to provide a suitable living environment for every American family as imposed on HUD by Congress in 42 U.S.C. § 1404; and was a violation of certain Illinois housing statutes and Chicago building codes. Jurisdiction for this action is invoked pursuant to 28 U.S.C. § 1331. The cause is before the court on defendants' motion to dismiss and cross-motions for summary judgment.

Defendants' Motion to Dismiss

In their motion defendants claim that plaintiffs fail to state a claim for relief insofar as the complaint rests on violations of the mandate of Congress expressed in its declaration of

national housing policy in 42 U.S.C. § 1441.

> The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortgage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.

The law is clear that HUD has broad discretion in its implementation of the National Housing Policy, however, "[w]hen an administrative decision is made without consideration of relevant [policy] factors it must be set aside." Shannon v. U.S. Dept. of Housing and Urban

Development, 436 F. 2d 809, 819 (3d Cir. 1970). Thus, HUD must act "in an appropriate manner and for a rational reason related to the achievement of the statutory objectives." Cole v.Lynn, 389 F. Supp. 99, 102 (D.C.Cir. 1975). Section 1441 "is not precatory; HUD is obliged to follow these policies. Action taken without consideration of them, or in conflict with them, will not stand." Commonwealth of Pennsylvania v. Lynn, 501 F. 2d 848, 855 (D.C.Cir. 1974). On examination of the complaint, this court concludes that plaintiffs have stated a claim on which relief can be granted insofar as it is premised on defendants' violations of the policy mandates under 42 U.S.C. § 1441. Accordingly, defendants' motion to dismiss on this ground is denied.

Defendants also contend that plaintiffs fail to state a claim insofar as the complaint is premised on violations of HUD regulations, because these "regulations" are in fact only handbook provisions which are not binding on HUD since they do not have the force of law. In support of this contention, defendants note that these provisions are not published and in fact are merely statements of HUD policy, not intended to create a private right of action.

The general rule is that in order for an agency regulation to be binding and have the force of law, the agency promulgating the regulation must follow the formal rules set out in 5 U.S.C. § 553 and in most cases must publish the regulation in the Federal Register. The purpose of the requirements set forth in 5 U.S.C. § 553 is to

put all interested parties on notice of the regulation's existence. However, it has been held that even unpublished regulations can be binding and have the force of law with respect to parties who have actual knowledge of the regulation. See Arlington Oil Mills, Inc. v. Knebel, 543 F. 2d 1092 (5th Cir. 1976); du Pont de Nemours & Co. v. Train, 541 F. 2d 1018 (4th Cir. 1976); United States v. Aarons, 310 F. 2d 341 (2d Cir. 1962). See also, K. Davis, Administrative Law Treatise, 6.10 (1975).

Although there is no definitive legal authority in this circuit setting forth the legal effect of handbook provisions, this court is cognizant of the fact that whether handbook provisions have the force of law is a question of fact turning on the intent of the agency promulgating the handbook. See Estrada v.

Hill, 401 F. Supp. 429 (N.D. Ill. 1975). Due to the inconclusive nature of the record before the court and the court's conclusion that this cause should proceed for presentation on the merits, this court declines to grant defendant's motion to dismiss on this ground. Accordingly, it is denied.

Defendants have raised at least two other contentions which this court has considered. First, defendants assert that plaintiffs lack standing to prosecute this suit. However, after examination of the complaint, this court holds that the individually named plaintiffs and the Five Block Club have alleged a sufficient stake in the outcome of this controversy to confer standing on themselves to bring this suit. See Sierra Club v. Morton, 405 U.S. 727, 739 (1971). Second, defendants suggest that

plaintiffs cannot state a claim insofar as the complaint is premised on violations of Illinois statutes and Chicago ordinances. However, since plaintiffs state a claim for relief under 42 U.S.C. § 1441 over which this court has jurisdiction under 28 U.S.C. § 1331, this court need not now reach the delicate issue of whether Hancock v. Train, 426 U.S. 167 (1976), bars application of local housing laws to HUD-owned buildings on the ground that all federally owned land is exempt from state regulation unless there is an affirmative waiver of immunity by Congress. Finally, defendants contend that plaintiffs' claim has been mooted since HUD has not held title to the subject matter building since July, 1976. While it appears that plaintiffs' claim for declaratory relief has been mooted, their claim for damages, however speculative, has not. Therefore,

the motion to dismiss on this ground is denied.

Cross-Motions for Summary Judgment

In August 1975, HUD obtained legal title to the building, and held title until July 9, 1976 when HUD sold the building to the City of Chicago. In their motion for summary judgment supported by affidavit and depositions, plaintiffs claim that during the 19 months that defendants held title to the building, it was vacant, abandoned, and in a state of disrepair. They claim that glass was broken throughout; rats and mice were prevalent; foundations were badly cracked; floors were in dangerous and hazardous condition; exterior doors were insecure; roaches and other insects infested the building; and debris was scattered throughout the building. Plaintiffs

claim that since they live near the building, its condition during this period of 19 months posed a serious danger to their health and safety and, in addition, greatly lowered the quality of their living environment.

Defendants in their motion for summary judgment supported by affidavits and depositions materially controvert plaintiffs' claim with regard to the condition of the building. Defendants claim that the building was well-maintained and, as such, did not pose any danger to plaintiffs' health and safety, or the quality of their environment.

Summary judgment is proper only where there are no issues of material fact and the movant is entitled to judgment as a matter of law. See Butler v. Bensinger, 377 F. Supp. 870 (N.D. Ill. 1974). On review of the record in this

case, there appear to be issues of material fact concerning the condition of the subject matter property during the time defendants held title. Accordingly, the cross-motions for summary judgment are denied.

So ordered

s/ George N. Leighton
United States District Judge

Dated: October 11, 1978

APPENDIX F

Relevant Statutory Provisions

The Housing Act of 1949, 42 U.S.C. § 1441, provides in pertinent part:

> The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation . . . . The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall

> exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established . . . .

The Department of Housing and Urban Development Act, as amended, 42 U.S.C. § 1441a, provides:

> (a) The Congress finds that the supply of the Nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949, of the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family". The Congress reaffirms this national housing goal and determines that it can be substantially achieved within the next decade by the construction or rehabilitation of twenty-six million housing units, six million of these for low and moderate income families.

(b) The Congress further finds that policies designed to contribute to the achievement of the national housing goal have not directed sufficient attention and resources to the preservation of existing housing and neighborhoods, that the deterioration and abandonment of housing for the Nation's lower income families has accelerated over the last decade, and that this acceleration has contributed to neighborhood disintegration and has partially negated the progress toward achieving the national housing goal which has been made primarily through new housing construction.

(c) The Congress declares that if the national housing goal is to be achieved, a greater effort must be made to encourage the preservation of existing housing and neighborhoods through such measures as housing preservation, moderate rehabilitation, and improvements in housing management and maintenance, in conjunction with the provision of adequate municipal services. Such an effort should concentrate, to a greater extent than

> it has in the past, on housing and neighborhoods where deterioration is evident but has not yet become acute.

The National Housing Act, 12 U.S.C. § 1713, provides in pertinent part:

> (k) Acquisition of property by conveyance or foreclosure. The Secretary is hereby authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion . . . .
>
> (g) Handling and disposal of property; settlement of claims. Notwithstanding any other provisions of law relating to the acquisition, handling, or disposal of real property by the United States, the Secretary shall have power to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in his discretion, any

> properties conveyed to him in exchange for debentures and certificates of claim as provided in this section . . . .

The National Housing Act, as amended, 12 U.S.C. § 1702, provides, in pertinent part:

> The powers conferred by this Act shall be exercised by the Secretary of Housing and Urban Development (hereinafter referred to as the "Secretary"). In order to carry out the provisions of this title and titles II, III, V, VI, VII, VIII, IX, X, and XI, the Secretary may establish such agencies, accept and utilize such voluntary and uncompensated services, utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, [and appoint such other officers and employees as he may find necessary . . . .] The Secretary shall, in carrying out the provisions of this title and titles II, III, V, VI, VII, VIII, IX, X, and XI be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

Relevant Portions of the HUD Property Disposition Handbook Paragraph 23, Chapter 2, of the HUD Handbook provides, in pertinent part:

> b. The repair program shall include all repairs necessary to create maximum sales appeal and eliminate existing or potential structural, mechanical and other deficiencies. In addition, the repair program should include such upgrading which, because of type and location of the properties, the Director determines necessary to generate sales, or to stabilize or improve neighborhoods. In establishing the repair program, particularly where inner-city, core-area properties are involved, it is important to be aware of the salutary effect that will probably result. The timely provision of repair or substantial rehabilitation may be critical to the preservation of blocks and even

neighborhoods in older areas of our cities and suburbs. Typically, in older but still sound neighborhoods, the rehabilitation of one house on the block can lead to investment in upgrading other houses on the block. The result of the repair program with respect to deteriorating or substandard housing should be to create a structure in like-new condition, with all components operable, and with no major expense in the offing for several years. All major repair work shall be accomplished in accordance with established formal contracting and purchase order procedures.

* * *

g. Immediate Protective Repairs. Irrespective of whether full repairs are delayed, immediate attention shall be given to those repairs required to

prevent undue deterioration and eliminate hazardous conditions that may be dangerous to the public.

h. Initial Cleanup and Maintenance. It is essential that unsightly conditions be corrected promptly. Immediately upon taking possession the Area Management Broker (AMB) or the local office if an AMB is not available, shall make arrangements to have all rubbish removed and the premises given a thorough cleaning, including cutting of grass, weeding, and trimming of shrubbery if needed.

i. Continued Maintenance. In addition to the initial cleaning, arrangements shall also be made for continued "housekeeping" maintenance, such as care of shrubbery and lawns, snow removal and broom cleaning. Unoccupied properties must be maintained in clean and presentable condition.

Paragraph 185, Chapter 7 of the HUD Handbook provides, in pertinent part:

> Repair and Maintenance Objectives.
>
> a. The overall objective is to (a) place properties in first-class condition to create maximum sales appeal at the highest obtainable sales price in order to contribute to maintenance of a firm real estate market; (b) eliminate potential default hazard attributable to physical deficiencies; and (c) eliminate all structural, (including termite infestation) mechanical and surface deficiencies which, if not eliminated, would result in major repair or replacement expenditures by the purchaser, or demands upon HUD under the terms of the warranty on the Sales Contract, Form 2384.

Paragraph 80, Chapter 3, of the HUD Handbook, provides in pertinent part:

> 80. Supervision of Area Management Brokers. In order to obtain quality performance on a timely basis, the CPO shall be responsible for assuring

that each area management broker (AMB) understands what is expected of him, and that he is familiar with the standards of acceptable performance established by the local office for all activities under his supervision. The CPO shall supervise the activities of each AMB to the extent necessary to develop and maintain top quality management services. Where an AMB is new to the program, the CPO shall expend a sufficient amount of time, either personally or by a qualified staff member, in training and supervising the AMB and his employees who are engaged in performing the services required under the broker contract.

Office - Supreme Court, U.S.
FILED
APR 16 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1136

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEO BURROUGHS, JR., ET AL., PETITIONERS

v.

CARLA HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

California v. *Sierra Club*, 451 U.S. 287 4

Cort v. *Ash*, 422 U.S. 66 ..... 2, 3, 4, 5

Daily Income Fund, Inc. v. *Fox*, No. 82-1200 (Jan. 18, 1984) 3, 5

Davis v. *Romney*, 490 F.2d 1360 4

Delta Air Lines, Inc. v. *August*, 450 U.S. 346 6

Falzarano v. *United States*, 607 F.2d 506 4

Merrill Lynch, Pierce, Fenner & Smith v. *Curran*, 456 U.S. 353 3

Shivers v. *Landrieu*, 674 F.2d 906 4

Texas & P.R.R. v. *Rigsby*, 241 U.S. 33 3

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 3

Touche Ross & Co. v. *Redington*, 442 U.S. 560 ..... 4, 5

Transamerica Mortgage Advisers, Inc. v. *Lewis*, 444 U.S. 11 5

United States v. *King*, 395 U.S. 1 4

United States v. *Mitchell*, No. 81-1748 (June 27, 1983) 4, 5

Universities Research Ass'n v. *Coutu*, 450 U.S. 754 5

Page

Statutes and rule:

Davis-Bacon Act of 1931 §1, 40 U.S.C. 276a 5

Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.* 5

National Housing Act, 12 U.S.C. 1701 *et seq.* 1

§ 204, 12 U.S.C. 1710 ..... 1, 3

Securities and Exchange Act of 1934 § 17(a), 15 U.S.C. 78q(a) 5

12 U.S.C. 1701t 4

18 U.S.C. 610 5

42 U.S.C. 1441 4

42 U.S.C. 1441a(b) 3

42 U.S.C. 1441a(c) 3

Fed. R. Civ. P. 54(d) 5

In the Supreme Court of the United States

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LEO BURROUGHS, JR., ET AL., PETITIONERS

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CARLA HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners challenge the court of appeals' conclusion that the National Housing Act (the Act), 12 U.S.C. 1701 *et seq.*, does not create a private right of action on behalf of neighborhood residents for damages flowing from the deterioration of a federally-owned building. They also challenge the court of appeals' holding that the prevailing parties should have been awarded litigation costs.

1. In 1974, the Department of Housing and Urban Development (HUD) acquired a three-story residential building in Chicago through a foreclosure action, pursuant to Section 204 of the Act, 12 U.S.C. 1710. The property subsequently fell into disrepair, and its value declined precipitously. In July 1976, HUD sold the building to the City of Chicago for $1. Pet. App. A3.

In April 1976, petitioners — individuals who live in the vicinity of the building and a neighborhood organization — brought this suit in the United States District Court for the Northern District of Illinois against several HUD officials and the broker hired by HUD to maintain the building (Pet. App. A2). Finding their cause of action in the Act, petitioners sought damages from the HUD officials in both their official and their individual capacities, asserting that the officials had violated the Act by allowing the property to become a hazard to public health (Pet. App. A2, A6).[1]

The district court granted summary judgment in favor of the HUD officials, holding that the Act provides no private cause of action (Pet. App. C1-C64). The court noted that the Act does not in terms create such a right (*id.* at C13); it declined to find a private cause of action implicit in the statute because petitioners "are not the sole or even primary beneficiaries of the [Act]" (*id.* at C32) and because creating a private damages remedy "would be at cross purposes with the fundamental objectives of the statute and other housing legislation" (*id.* at C38). But the court denied costs to the HUD officials, finding that the case presented novel questions and that petitioners were of "limited means" (*id.* at D1).

The court of appeals affirmed on the merits (Pet. App. A1-A35). The court found that petitioners failed to satisfy the standard for implying a private right of action that is set out in *Cort* v. *Ash*, 422 U.S. 66 (1975): they are not "*special* beneficiaries" of the Act (Pet. App. A10 (emphasis in original)); nothing in the Act's language or legislative history suggests that Congress wished to create such a right (*id.* at A11); and the creation of a damages remedy would injure the underlying legislative scheme by "mak[ing] HUD

---

[1]Petitioners originally sought injunctive relief as well; that claim was abandoned when the building was sold in July 1976 (Pet. App. A2).

management reluctant to foreclose" (*id.* at A12). The court of appeals also held that the district court abused its discretion in denying the HUD officials costs (*id.* at A1-A2), although each of the judges expressed his reasoning on this point in a separate opinion (*id.* at A14-A15, A25-A29, A33-A34).

2. a. In considering petitioners' contention that a private right of action should be implied under the Act, the "focus must be on 'the intent of Congress.' " *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 377-378 (1982), quoting *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). That intent "may in turn be discerned by examining a number of factors, including the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the states in affording the relief claimed." *Daily Income Fund, Inc.* v. *Fox*, No. 82-1200 (Jan. 18, 1984), slip op. 12. These criteria offer no support to petitioners.

As petitioners readily acknowledge (Pet. 16-17), there is absolutely nothing in the statutory language or legislative history suggesting that Congress intended to create a private right of action under the Act. It is equally plain that petitioners do not fall into a " 'class for whose *especial* benefit' " either the Act in general, or 12 U.S.C. 1710 in particular, was enacted. Cort, 422 U.S. at 78 (emphasis in original), quoting *Texas & P.R.R.* v. *Rigsby*, 241 U.S. 33, 39 (1916). While there is little doubt that the Act was in part designed to preserve existing neighborhoods and thus incidentally to benefit individuals in petitioners' circumstances (see 42 U.S.C. 1441a(b) and (c)), the district court correctly observed that "[t]here can be no questions, and [petitioners] do not dispute, that potential *inhabitants* of

federally-funded or supported housing are the primary beneficiaries of federal housing legislation" (Pet. App. C33 (emphasis added)). See 12 U.S.C. 1701t; 42 U.S.C. 1441. The mortgage provisions of the Act, meanwhile, were designed to benefit bankers, developers, and the United States itself. See *Shivers* v. *Landrieu*, 674 F.2d 906, 911 (D.C. Cir. 1981); *Falzarano* v. *United States*, 607 F.2d 506, 510 (1st Cir. 1979).[2] These considerations suffice to dispose of petitioners' claim that the Act creates a private right of action under the *Cort* v. *Ash* analysis[3] — and therefore necessarily dispose as well of petitioners' further, even more questionable, assertion that the Act affords them an action for damages against federal officers acting in their official capacities. See *United States* v. *King*, 395 U.S. 1, 4 (1969) (the federal government's "waiver [of sovereign immunity] cannot be implied but must be unequivocally expressed").

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[2]For these reasons, the courts of appeals have been unanimous in rejecting attempts even by the tenants or purchasers of federally-insured housing to assert a private right of action under the Act. *Shivers*, 674 F.2d at 911; *Falzarano*, 607 F.2d at 510; *Davis* v. *Romney*, 490 F.2d 1360, 1372 (3d Cir. 1974).

[3]The Court has indicated that, when the language and legislative history of a statute provide no indication that Congress intended to "create federal rights for the especial benefit of a class of persons," it is "unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of interest." *California* v. *Sierra Club*, 451 U.S. 287, 297-298 (1981). See *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-576 (1979). It is worth noting, however, that neither of these latter considerations aids petitioners. The creation of a damages remedy — particularly one that runs against HUD officials in their individual capacities — might well discourage officials from becoming involved at all in the construction or insurance of housing units. See *Shivers*, 674 F.2d at 912. And it is the state courts that traditionally have provided a forum for persons "harmed unreasonably by conditions on neighboring property" (Pet. App. A32 (Flaum, J., concurring)).

Despite petitioners' contention to the contrary, *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), is entirely consistent with this conclusion. In *Mitchell*, the Court addressed a complex set of statutes and regulations that "give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians" (slip op. 18) and that had been enacted against the background of "the undisputed existence of a general trust relationship between the United States and the Indian people" (*id.* at 19). In this extraordinary setting, the Court held that government mismanagement of timber resources on an Indian reservation could make the government "liable in damages [to the Indians] for the breach of its fiduciary duties" (*id.* at 20). In contrast, it is difficult to imagine how the provisions of the Act place HUD in a fiduciary relationship with individuals who live near federally-owned buildings.[4]

b. Petitioners' challenge to the court of appeals' costs decision is insubstantial. Petitioners do not deny that a presumption exists under Fed. R. Civ. P. 54(d) in favor of awarding litigation costs to the prevailing party (Pet.

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[4]Petitioners also are incorrect when they contend that congressional silence on the existence of a private right of action gives rise to a presumption in favor of *creating* such a right when the statute involved was enacted prior to this Court's decision in *Cort* (Pet. 21-22). The test enunciated in *Cort* and reiterated in cases such as *Daily Income Fund* is directed at ascertaining congressional intent; the Court accordingly applied the test in the *Cort* case itself to find no private right of action (see 422 U.S. at 77-85, interpreting 18 U.S.C. 610), and it repeatedly has done so since in finding that private rights were not created by statutes enacted prior to the *Cort* decision. See, *e.g.*, *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754 (1981) (interpreting Section 1 of the Davis-Bacon Act of 1931, 40 U.S.C. 276a); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979) (interpreting Section 17(a) of the Securities and Exchange Act of 1934, 15 U.S.C. 78q(a)); *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. 11 (1979) (interpreting Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*).

31-32). Here, the three opinions by the panel members offer a variety of considerations to support the conclusion that the district court erred in finding that presumption overcome: petitioners were not found to be indigent (Pet. App. A14, A34); the case was not of "landmark" importance (*id.* at A14) and in fact "border[ed] on the frivolous" (*id.* at A26); and the HUD officials did not "deserve to be penalized for their conduct in this litigation" (*id.* at A34). These factors justify the conclusion that there was no "element of injustice in a cost award" to the HUD officials. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 355 n.14 (1981). The court of appeals' fact-bound determination certainly does not warrant further consideration by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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